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Abstract

In this article, the author argues that it is only possible to determine whether judges are likely to be good judges if we understand the practice of judging and the telos of justice toward which its aims, and that elections cannot help voters determine what qualities are necessary in judges and for what reasons. Moreover, I argue that traditional elections require virtues in politicians which are not often found in good (virtuous) judges, making them an unsuitable way of selecting candidates.

Keywords

Judges--Elections, Responsibility, Politicians

Disciplines

Judges

Can a Good Judge Be a Good Politician?

Judicial Elections from a Virtue Ethics Approach

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Republican Party of Minnesota v. White,¹ though unremarkable in terms of First Amendment theory, is one of those cases where application is everything. In *White*, the United States Supreme Court held that Minnesota's "announce" clause, which had prohibited candidates in judicial elections from announcing their views on contested issues "likely to come before them," was a content restriction under the Speech Clause of the First Amendment.² As such, it was subject to strict scrutiny; and as usual, the Court's application of the second prong, requiring a "least restrictive alternative" or "narrowly tailored" regulation, was "fatal in fact."³ Perhaps the most interesting aspect of the case from a constitutional perspective was the majority's decision to probe with some specificity the state's proffered "compelling state interests" in the appearance and reality of impartiality,⁴ since very few of the Court's strict scrutiny opinions have bothered to parse what the state might mean when it claims such an interest.⁵

However, the implications of *White* go well beyond its meager contribution to First Amendment jurisprudence. These implications extend far beyond the approximately sixteen states that, like Minnesota, employ nonpartisan popular elections as a means to seat or ratify interim appointments of state judges.⁶ Indeed, the *White* case has brought more popular visibility to the recurring national debate about how judges are best selected.⁷

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1. 536 U.S. 765 (2002).

2. *Id.* at 774-75.

3. *Id.* at 775-81. See J.J. GASS, AFTER WHITE: DEFENDING AND AMENDING THE CANONS OF JUDICIAL ETHICS 5 (Brennen Ctr. for Justice, Judicial Indpendence Series 2004), available at www.brennancenter.org/programs/dem_fc_canons.html.

4. *White*, 536 U.S. at 775-81 (discussion of three senses of impartiality).

5. See Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception"*, 43 STAN. L. REV. 599, 603-04 (1991) (noting that "scant jurisprudence exists on" what a compelling state interest is, creating doctrinal instability).

6. In *White*, Justice Scalia notes that Minnesota has employed elections to select judges since 1858, and since 1912, has used nonpartisan elections. 536 U.S. at 768. Justice O'Connor notes that thirty-one states use popular election for some judges, and a little more than half of them use nonpartisan elections. *Id.* at 792 (O'Connor, J., concurring). She also notes that "[m]ost of the States that do not have any form of judicial elections choose judges through executive nomination and legislative confirmation." *Id.* (O'Connor, J., concurring). These figures vary depending on what year

In this Article, I argue that direct judicial elections, at least to the extent that they mimic other general elections, are not the wisest course for selecting judges, though not precisely for the usual reasons cited by commentators—e.g., that lawyers are in a better position to evaluate the merits of judicial candidates than the public because they are less likely to be swayed by single-issue politics or irrelevant matters.⁸ In fact, it seems to me that both the perspectives of the practicing bar and the public are necessary to hold judges accountable. For example, a lawyer may be in a better position to identify judicial incompetence, whereas members of the public might be more likely to identify judicial arrogance or bias toward minority litigants.

Instead, I will suggest that the public virtues that make a person a good judge are not usually the same virtues that make a good (one might say virtuous) politician, e.g., a person who campaigns for popular election to a politically responsive office. If I am correct, then the presumption that philosophy equals methodology equals right outcomes is unseated. Stated more concretely, if we begin with the assumption that democratic accountability can be best achieved through traditional direct elections, then we must necessarily presume that the best or most virtuous campaigners are also the best or most virtuous officeholders. Even conceding the much-debated validity of this presumption for traditional executive or legislative candidates, I will argue that it clearly does not hold true for judges. If my account proves plausible, then even those who champion democratic selection of judges would want to call for a system that selects those best at the task of judging. Such a system would encourage true democratic accountability while selecting virtuous

and what positions are included. See also Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1227-32 (1998) (describing South Carolina's legislative appointment system). Driggers notes that twelve states appoint judges, but in only three states—Virginia, South Carolina, and Virginia—are any of them appointed by legislators rather than the governor. *Id.* at 1222.

7. See, e.g., Jean Holloway, *President's Message: Judges and Politics Don't Mix*, WITH EQUAL RIGHT (Minn. Women's Lawyers, Minneapolis, Minn.), July 2004, at 2 (on file with author); Bert Brandenburg, *Keep the Courts Free and Fair: The Influence of Special Interests and Partisan Politics Threatens the Independence of Judges and the Rights of all Americans. But Groups are Unifying to Counter the Trend*, TRIAL, July 1, 2004, at 32; Beth Hanson, *Judges' Free Speech on the Agenda: U.S. High Court Weighs Certiorari for Suit Challenging Political Activity Ban*, 176 N.J. L.J. 706 (2004); *Top Cases of 2003*, N.Y. L.J., Feb. 23, 2004, at 14 (discussing *White* in conjunction with the *Spargo* case).

8. See, e.g., ABA COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 22-23 (2003) [hereinafter JUSTICE IN JEOPARDY] (noting the rise of single-issue political organizations and the concomitant rise in single-issue campaigns in state appellate court elections); Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up On the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 45-46 (2001).

judges, unlike the current system, in which any law-trained citizen, no matter how incompetent, can take her chances at the polls.

In making the argument that good judges do not usually make good electoral candidates, and therefore should not be elected, I borrow from the contemporary resurgence of virtue ethics. While there are numerous competing strands of this longstanding Western tradition, I will primarily focus on a simplified version of the argument presented in Alasdair MacIntyre's text, *After Virtue*.⁹ MacIntyre's account of virtues as habits of character necessary for those carrying out social traditions also informs the practice of judging, which is aimed toward the *telos* of justice in society.

I. RESOLVING THE PROBLEM OF DEMOCRATIC ACCOUNTABILITY IN JUDICIAL SELECTION

The Minnesota judicial canon struck down in *White* was essentially a finger-in-dike attempt in a much larger code, a rule designed to prevent typical campaign excesses as well as the more mundane problems associated with the selection of judges through popular election.¹⁰ Modeled after the ABA Model Code of Judicial Ethics, state codes such as Minnesota's have been undergoing revision for some time, and the cases leading up to and decided after *White* have prompted further revisions in many states.¹¹ Some of these

9. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984).

10. See MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5 (2004); see also *infra* note 13.

11. See, e.g., Plymouth Nelson, Note, *Don't Rock the Boat: Minnesota's Canon 5 Keeps Incumbents High and Dry While Voters Flounder in a Sea of Ignorance*, 28 WM. MITCHELL L. REV. 1607, 1619-21 nn.66-67 (2002) (noting revisions in "announce" clause and "political participation" sections of state judicial codes). Nelson describes the history of these canons, beginning with the ABA's first thirty-six "Canons of Judicial Ethics" drafted in 1924 by a committee headed by Chief Justice William Howard Taft. *Id.* at 1614. This code included prohibitions against political speech or "announcements" to "secure class support." *Id.* A new, but this time enforceable, Model Code of Judicial Conduct was adopted in 1972. *Id.* The provisions at issue in *White* were then contained in Canon 7, which prohibited announcements of views on "disputed political issues" or "disputed legal issues." *Id.* Revisions on the 1972 code, including the revision of Canon 7, began in 1986; and campaign provisions were re-codified in a new Canon 5 which addressed political conduct of judges and candidates generally (5A), appointed candidates (5B), sitting judges and elected candidates (5C), and incumbent judges during their judgeships (5D). *Id.* at 1615. These provisions were adopted by the ABA in August 1990. *Id.* However, not all states moved to the 1990 revisions, and many commentaries on the case refer to Canon 5 and Canon 7 interchangeably. See, e.g., Reynolds Cafferata, Note, *A Proposal for an Empirical Interpretation of Canon 5*, 65 S. CAL. L. REV. 1639, 1640-41 (1992) (noting "pledges or promises" and "announce" provisions of Canon 7). For a sample of how some states have retained Canon 7 and others have moved to Canon 5

canons impose discipline for those election offenses that are clearly problematic under any understanding of moral election behavior, such as lying about one's opponent or direct influence-peddling.¹² Other parts of the canons, such as the canon struck down in *White*, can only be fairly described as attempts to make a judicial election as little like an election as possible, while still operating within the basic electoral framework.¹³ Such canons have seemingly

as of 1999 at least, see *Opinion and Order Implementing Recommendations of the Supreme Court Judicial Campaign Finance Study Committee*, 62 TEX. BAR J. 946, 947 n.13 (Oct. 1999) [hereinafter *Implementing Recommendations*]. See also *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002) (holding canon preventing misleading or false statements by candidate was constitutionally overbroad); *Butler v. Ala. Judicial Inquiry Comm'n*, 802 So. 2d 207 (Ala. 2001) (invalidating similar provision as overbroad). For a history of cases leading to *White*, see Adam R. Long, *Keeping Mud off the Bench: The First Amendment and Regulation of Candidates' False or Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 798-802 (2001).

12. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(iii) (1990) (amended 2003) (requiring that the candidate should not: "knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent"); Canon 5 B(1) (requiring that "[a] candidate for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy").

13. Minnesota's current Canon 5 (formerly Canon 7) provides, *inter alia*, that any judicial candidate "shall not:"

- (i) with respect to cases, controversies or issues that are likely to come before the court, make pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office; or knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, expressed position or other fact concerning the candidate, or an opponent; or
- (ii) by words or conduct manifest bias or prejudice inappropriate to judicial office.

MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i)-(ii) (2004).

See also MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i)-(ii), requiring that candidates "shall not:"

- (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [hereinafter referred to as the "pledges or promises" provision]
- (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; [successor of the "announce" clause and hereinafter referred to as the "commitment" provision].

About thirty-seven states had adopted some variation of the "pledges and promises" and "commitment" provisions of the 1990 Code. See GASS, *supra* note 3, at 3.

The Minnesota Canons also require that a judicial candidate not:

- (a) act as a leader or hold any office in a political organization; identify themselves as members of a political organization, except as necessary to vote in an election; (b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office; (c)

come about because of the bar's perception that the no-holds-barred atmosphere of modern American elections poses too great a risk that judges without the requisite professional credentials and moral character will be elected.¹⁴ To ameliorate the pernicious effects of modern elections on the selection of judges, the original canons prohibited or strictly regulated electoral activities considered standard fare in general democratic elections, such as affiliating with a party and supporting its activities, raising funds, offering (non-bribe) incentives to voters to select a party favorite, and issuing "platforms" of priority issues on which the candidate promises to act after election.¹⁵

In crafting these restrictions, the drafters of the canons opened themselves up to the standard objections to attempts to limit democratic accountability. First, in a free culture, elections serve as a central ritual and teaching moment on the importance, as well as the dangers, of political speech and freewheeling democratic participation.¹⁶ Without elections, we would have

make speeches on behalf of a political organization; (d) attend political gatherings; or seek, accept, or use endorsements from a political organization; or (e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5A(1)(a)-(e). See also MODEL CODE OF JUDICIAL CONDUCT 5B(2) requiring that a candidate "shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law." The 1990 canons made a significant adjustment to other prohibited activities for judges up for election, though not all jurisdictions have accepted all of these revisions, see, e.g., the Minnesota canons cited above. The 1990 revisions to Canon 5 provide that a judge or a candidate subject to public election may: "(i) purchase tickets for and attend political gatherings; (ii) identify himself or herself as a member of a political party; and (iii) contribute to a political organization." MODEL CODE OF JUDICIAL CONDUCT Canon 5C(1). Canon 5 also provides that "when a candidate for election [he or she may] (i) speak to gatherings on his or her own behalf; (ii) appear in newspaper, television and other media advertisements supporting his or her candidacy; (iii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy; and (iv) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running." *Id.* at 5C(1)(b).

14. For examples of these arguments, see Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1214 (2000) (noting Kathy Abrams' view that in some cases, electoral accountability standards pose "weak procedural checks on judicial qualifications and performance, such as honesty and temperament").

15. See *supra* note 13. See also Miss. Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006 (Miss. 2004) (holding that judge could not be constitutionally sanctioned for "anti-gay" speech).

16. See, e.g., Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 368-69 (1993) (noting that "[e]lections are the primary mass rituals by which the political

very few publicly accessible models for what robust public speech regimes might mean for regular citizens, what purposes free speech serves, and how it can be misused by those who want to pander to the fears and emotions of the electorate. The canons appear to subvert the democratic ritual by forbidding judicial candidates from speaking about precisely those controversial issues that the electorate wants to "talk" about—the death penalty, abortion rights, law and order, and so forth. Of course, citizens arguably have the right to engage in democratic activity three hundred sixty-five days a year, and many citizens regularly exercise their political freedoms through legislative advocacy and participation in community life. However, election years are like car maintenance schedules, reminding the rest of the electorate, who are usually busy with the many challenges of their own lives, that it is time for a citizenship "tune-up," time to inspect the machinery of government and decide if any replacement parts are necessary.

And, just as elections serve as a model for a public that needs to understand the values and risks of freedom, they also serve as a symbolic reenactment of the equality principle—any person, from a populist like Dennis Kucinich to a member of a politically ascendant minority group like Al Sharpton to a very wealthy, connected person like George Bush, can run for office and can be judged by the voters as if he were their peer.¹⁷ Of course, as with any important community ritual,¹⁸ public elections engender a flood of conflicting emotions within the electorate about the nature of political equality, especially in its sharp contrast with social and economic inequality in America. Voters simultaneously embrace candidates standing as equals before their judgment and resent them for their success in achieving renown in a supposedly democratic process. Voters look up to political figures as heroes in whom they must believe to feel that their futures are secure, and yet voters

ethos is projected and affirmed. As a consequence of the voter's personal choice to participate, she may receive, or 'hear,' the messages of that political ethos. To pass on valuable features of the American identity and strengthen the bonds of membership, the society regenerates social meanings and practices that are highly valued, such as political autonomy and democratic governance.").

17. See David Greenberg, *The Trials of John Edwards: Why the Ace Lawyer Became a Lackluster Candidate*, LEGAL AFF., Jan./Feb., 2004, at 46, 49 (reviewing JOHN EDWARDS, *FOUR TRIALS* (2004)) (noting that Sharpton "intuitively understands that having lived the American Dream confers far more than simple credibility; it confers the potential power to inspire"); Leslie H. Southwick, *Presidential Also-Rans & Running Mates 2000 Part II: Nader-LaDuke*, 7 GREEN BAG 257, 272 (Spring 2004) (noting populist tone of Dennis Kucinich).

18. See, e.g., RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 271-78 (1978) (describing how average people need to believe in a charismatic figure to avoid chaos, but discard him as a phony when he does not produce; and how secular charisma is based on popular resentment against the existing order, working on the populace to believe that an "abstract, invisible class of people" have agreed to keep them from their just deserts).

are suspicious that they are being manipulated by candidates for their own advantage.¹⁹

Visible constraints on electoral processes, including highly visibly paternalistic interventions such as suppressing speech because it might mislead the public,²⁰ tend to inflame the worst sentiments of the electorate. By implying that voters' practical wisdom is not to be trusted, they further increase voter suspicion and resentment of elite manipulation.²¹ Indeed, most traditional opponents of judicial merit selection, which is thought to be the antidote for campaign problems, have argued that the process is elitist, secretive, unaccountable to and unreflective of the interests of citizens, and highly political.²² The historical tug of war between judicial appointment systems and judicial elections seems to bear this suspicion out, at least in part. Appointment systems, virtually the only mechanisms used for selecting judges until the late nineteenth century,²³ rested primarily on distrust of the democratic system to produce good judges.²⁴ Indeed, Michael Diminio writes that con-

19. *See id.*

20. *See, e.g.,* Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 582 (noting that the Supreme Court has not upheld speech restrictions premised on paternalistic rationales).

21. *See, e.g.,* Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 139 (2003) (suggesting that many scholars identify the move from appointment to election systems as in part based on resentment of appointed judges who were considered "the last dying kick of aristocracy") (quoting Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 191-92 nn.11-14 (1993)). By contrast, many reformers thought that elections would strengthen judicial independence, by breaking the tie between judgeships and political patronage. *Id.* Still others believed that the move to elections was an attempt "[to] weaken . . . officialdom as a whole" and "rein in the power of all officials to act independently of the people." *Id.* at 140 (quoting Nelson, *supra*, at 224) (first alteration in original).

22. *See, e.g.,* Jay A. Daugherty, *The Missouri Non-partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-legal Environment?*, 62 MO. L. REV. 315, 319 (1997); Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 311-12 (2003) (noting concerns about professional elitism); John H. Hill, Jr., *Taking Texas Out of Politics: An Argument for Merit Selection*, 40 BAYLOR L. REV. 339, 347 (1988) (noting that Texas' change to elections was in reaction to Reconstruction "carpetbagger" judges, and the strong influence of rural populations).

23. *See* Daugherty, *supra* note 22, at 316 (noting that the majority of states at that time used lifetime appointments subject to good behavior, and popular elections were "unheard of"). By the late nineteenth century, most states used judicial elections. *Id.* at 316-17. *See also* Phillips, *supra* note 21, at 138 (noting that most states opted for legislative elections or limited term appointments before the early nineteenth century).

24. *See* Republican Party of Minn. v. White, 536 U.S. 765, 791 (2002) (O'Connor, J., concurring) (noting that "[b]y the beginning of the 20th century, how-

servatives opposing the tidal wave of judicial election legislation from the period of 1846-1860 were concerned that good, i.e., scientifically minded, judges would be "subject[ed] . . . to the whim of the people and the manipulation of party leaders," which would breed contempt for the bench.²⁵ Such elections, they feared, would "hasten the day when nonlawyers would pre-
side on the bench."²⁶

By seeming to paternalize voters in this manner, even if they arguably deserve such treatment because of their apathy toward the issues in local judicial elections,²⁷ election constraints signal disrespect for the equality of citizens with their decision-makers. And many voters believe there is no worse signal of inequality, and no larger suspicion of hypocrisy, than when lawyers—already suspect in the public eye for utilizing the rhetoric of equality to gain power and influence for themselves—are the ones who seem to be paternalizing the voters. In the case of judicial elections, we might also note voter suspicion that election constraints are merely designed to enforce the upper-class virtue of politeness, which they may view as hypocritical and designed to protect a candidate from scrutiny.²⁸ As the continuing popularity of Bill

ever, elected judiciaries increasingly came to be viewed as incompetent and corrupt, and criticism of partisan judicial elections mounted"); Phillips, *supra* note 21, at 140 (noting surprise of reformers that judicial electoral systems also were governed by patronage).

25. See Dimino, *supra* note 22, at 311 (quoting Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 HISTORIAN 337, 341 (1983)). But see Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellwether State*, 38 WILLAMETTE L. REV. 1357, 1358-59 (2003) (noting that some lawyers championed judicial elections as a way to provide the judiciary with its own base of legitimacy and protect it from political patronage).

26. Dimino, *supra* note 22, at 311 (quoting Hall, *supra* note 25, at 341). See also White, 536 U.S. at 791 (O'Connor, J., concurring); Daugherty, *supra* note 22, at 317 (noting that Roscoe Pound, in his *The Causes of Popular Dissatisfaction with the Administration of Justice* in 1906 expressed his concern that elections had "almost destroyed the traditional respect for the bench"). Norman Krivosha tells the story of the American Judicature Society's move toward merit selection proposals after the Pound speech. Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128, 128-29 (1990) (noting that it was a major sparring point between Theodore Roosevelt and William Howard Taft, with Taft urging a return to pure appointments, and Roosevelt favoring elections).

27. See Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300, 300-02 (1992) (noting that voters typically know little about their choices, but that voters who vote in lower-level contests are typically more informed and interested in politics than others; and their voting behavior depends on what kind of information they receive. In judicial elections, the authors argue, voters get very little diverse information unless there is a particular policy issue on the burner, such as criminal justice or abortion.).

28. See Frances Kahn Zemens, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 637, 639 (1999) (noting that "judges' appeals

Clinton²⁹ may evidence, even if voters want their politicians to be paragons, at the same time, they want direct access to the “real person” of the candidate, warts and all. Thus, restrictions that seem to be based solely on etiquette are intuitively suspicious, even when they also result in candidates acting more “judicially,” i.e., like people would want a judge to act.

However, it is not clear that the antidote for lawyer paternalism is to allow judicial candidates to take their gloves off and engage in the same tactics as other candidates, as some commentators have implied.³⁰ There is little historical evidence that unregulated judicial elections ensure a more accountable judiciary than political appointment systems. In the late nineteenth and twentieth centuries when judicial elections were in their early bloom, the evidence suggests that most judges were “party hacks” who owed their seats on the bench to political friends rather than voter choice.³¹ And, as many cases on judicial election violations illustrate,³² “elite” objections to voter judicial selection by general ballot—most centrally that voters will allow unreflective emotions and single issues to drive their decisions—seem to be legitimate concerns, if sometimes overblown. Of course, many commentators have blamed poor judicial election results on the ethical constraints imposed by the judicial canons, which they claim make information on judicial quality difficult to gather.³³ However, even those jurisdictions with partisan elections that have experienced the most robust campaigning on the issues, such as Texas and New York, do not report promising results on judicial competence.³⁴ The simple fact is that voters often do not educate themselves on

to the public to respect the importance of judicial independence appear arrogant,” and their unwillingness to debate issues because it is not in keeping with the dignity of the office “rings of elitism”).

29. See Tom Shales, *Bill Clinton, Getting the Gang Ready to Rock and Roll*, WASH. POST, July 27, 2004, at C01.

30. See, e.g., Shannon L. Goessling, *Stifling Speech Threatens Voter Confidence*, FULTON COUNTY DAILY REP. (Atlanta), June 23, 2004, at 4 (arguing that judicial candidates should be held to the same campaign standards regarding speech as other candidates).

31. See Daugherty, *supra* note 22, at 317; Phillips, *supra* note 21, at 140.

32. See, e.g., *infra* notes 60, 86-94, 97-108, 115-117, 123-127 and accompanying text.

33. See, e.g., Roundtable, *Judicial Elections and Free Speech: Ethics and a Judge's Campaign Rhetoric*, 33 U. TOL. L. REV. 315, 318 (2002) (remarks of Associate Justice Harold See, noting that the answer to the problem of an uninformed electorate is increasing the amount of information available through campaign speech rather than curtailing First Amendment rights).

34. See, e.g., Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 53, 104-05 (1986) (noting that bar results show a far greater range of quality among elective judges than Missouri plan judge); Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 808-10 (2004) (describing substantially higher incidence of judicial discipline against elected judges than appointed judges in New York).

judicial candidates, their qualifications, or the most important issues relating to the judicial office.³⁵ Issues as mundane as burgeoning caseloads or judicial inefficiencies can easily be overlooked by the voting public, particularly when more prominent offices that dictate war and peace or influence the state of the economy occupy their attention.³⁶

It is possible to say that judges should be accountable to voters, and still say that it is not a good idea to elect them, at least in a traditional-style election. It is certainly not necessary to infer that judges must be chosen in traditional elections from the premise that they must be accountable. If good judges are not necessarily good electoral candidates, then alternatives to traditional elections should be explored, and it is not necessarily anti-democratic to advocate selection methodologies other than the traditional election. In reality, voters oversee, and demand accountability from, all kinds of government officials without directly electing them, from NASA engineers to county clerks to ambassadors. Wise voters will not demand that all government officials be elected; they will, instead, demand an accountability system that is suitable to the office being filled.

II. WHY THE SYSTEM MATTERS—CHIEF ELEMENTS IN THE CURRENT CONTROVERSY ON JUDICIAL SELECTION

As I have suggested, despite the Supreme Court's suggestion that states choosing judicial elections must, to borrow Justice Rehnquist's earlier metaphor, "take the bitter with the sweet,"³⁷ the *White* case has played an important role in reinvigorating a national conversation on the best way to select judges. However, that conversation can often be confusing. More than half of all voters express their suspicion of elected candidates and a distaste for electoral politics when it comes to judges. Yet, more than half also want to retain judicial elections.³⁸ While nonpartisan elections, proposed to remedy the ill

35. See, e.g., Daugherty, *supra* note 22, at 323; Hojnacki & Baum, *supra* note 27, at 300-01 (noting that voters know little about their judicial choices, possess very little information, and rely heavily on name recognition).

36. See, e.g., Cafferata, *supra* note 11, at 1661 (noting that "[m]ost judicial races do not receive media coverage because they are either too boring or are not high-visibility races") (footnote omitted); Daugherty, *supra* note 22, at 323 (noting that voters thought judicial retention elections were "boring" and failed to vote because they had inadequate information to make good choices). Daugherty notes, as well, that in Missouri, the erosion of retention election percentages for judges from 1984 onward to the 57 percent average in 1990 suggests more an erosion of trust in the judiciary generally than in specific judges. *Id.* at 320-21.

37. See *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974); *Bishop v. Wood*, 426 U.S. 341, 359 (1976) (White, J., dissenting).

38. See, e.g., Phillips, *supra* note 21, at 144-45 (noting that while three-fourths of Americans believe that judicial outcomes are affected by campaign contributions and other polls have confirmed public cynicism about the courts, voters in judicial elec-

effects of party politics on judicial selection, gained ascendancy briefly in the early 1990s, there has been no significant increase in the use of nonpartisan elections in recent years, and some states that had used them have since abandoned them.³⁹

The other significant turn away from traditional judicial elections, particularly noticeable in the 1960s and 70s after widespread disgust with judicial electioneering, has been the American judiciary's proposal for "merit selection," which is believed to be a "compromise between the goals of judicial independence and accountability to the public."⁴⁰ In the most popular form of merit selection, the so-called "Missouri Plan," judges are appointed by an elected official, such as the governor, from a small pool of candidates selected by a state commission composed of lawyers and laypersons. Once appointed, the judges must stand for retention on a regular basis.⁴¹ In a Mis-

tion states "prefer to retain [their franchise] by a two to one margin," and support merit selection only when the retention election aspects are highlighted). See also Daugherty, *supra* note 22, at 315.

39. "As of 1993, 12 states employed some form of partisan elections to fill at least some judicial vacancies (Alabama, Arkansas, Illinois, Indiana, Mississippi, Missouri, New York, North Carolina, Pennsylvania, Tennessee, Texas and West Virginia), while 17 others utilized nonpartisan elections (Arizona, Florida, Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Washington and Wisconsin)." Neil K. Sethi, Comment, *The Elusive Middle Ground: A Proposed Constitutional Speech Restriction for Judicial Selection*, 145 U. PA L. REV. 711, 713 n.8 (1997). Daugherty notes that nonpartisan elections were criticized as still vulnerable to the possibility that unqualified candidates could work hard to overcome qualified ones. Daugherty, *supra* note 22, at 317. There has been some suggestion that nonpartisan elections may be endangered or even that their basic premise of non-endorsement by parties is unconstitutional. See *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (holding that prohibition of party endorsements violated First Amendment right of political parties to free expression and right of party members to receive information); Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1397-98, 1416 (2003).

40. See Daugherty, *supra* note 22, at 317-18, 322 (referring to this system as the commission plan); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring). The American Judiciary Society started to develop merit selection methods as early as 1913. Daugherty, *supra* note 22, at 318.

41. Justice O'Connor describes the Missouri Plan as follows:

Under the Missouri Plan, judges are appointed by a high elected official, generally from a list of nominees put together by a nonpartisan nominating commission, and then subsequently stand for unopposed retention elections in which voters are asked whether the judges should be recalled. If a judge is recalled, the vacancy is filled through a new nomination and appointment. This system obviously reduces threats to judicial impartiality, even if it does not eliminate all popular pressure on judges.

White, 536 U.S. at 790-91 (O'Connor, J., concurring) (citations omitted).

souri Plan state, if a judge is not retained, her seat becomes vacant, and the process begins again.⁴²

Yet, while most states that have amended their constitutions since the 1970s have selected a Missouri-plan type of selection process, few other states have elected this approach.⁴³ And, while some states with unique systems—such as South Carolina, which originally appointed its judges through direct legislative election—have undergone merit-based revisions to allow for more “expert” input into the selection process, even South Carolina’s legislature has resisted attempts to give up their ultimate appointing authority.⁴⁴ Only six states employ the federal method, which involves political appointment for life and removal only by impeachment.⁴⁵ This figure hardly suggests a groundswell for a return to strict appointment systems. Indeed, considering all kinds of elections, including retention elections, it is estimated that in thirty-nine of fifty states, judges must face the electorate in some form.⁴⁶

Of course, judicial selection practices “on the ground” may not neatly follow one of the four major patterns—the direct appointment system, partisan elections, nonpartisan elections, or Missouri appointment/retention plans. “Merit” selection committees are often composed of political appointees, not necessarily the best qualified lawyers and judges in a particular state.⁴⁷ In addition, it is difficult to imagine that political affiliation and contributions do not influence which judges are selected in such systems.

Conversely, systems that appear to be exclusively electoral may not be so in reality. For example, in those states that elect judges, but allow the governor to appoint a judge if a seat becomes vacant between elections,⁴⁸ ap-

42. The Missouri plan requires a retention vote within a year of appointment, and requires at least 50 percent of the votes cast to retain. Daugherty, *supra* note 22, at 319. Circuit judges then are appointed to a six-year term, appellate judges to a twelve-year term. *Id.*

43. See, e.g., Phillips, *supra* note 21, at 139 (noting that every new state that entered the Union after 1846 except Alaska provided for elected judges, and more than two-thirds of existing states moved to elections between 1846 and the outbreak of the Civil War). Since the Missouri Plan was formulated, thirty-three states and the District of Columbia have adopted some form of it. Daugherty, *supra* note 22, at 319; Krivosha, *supra* note 26, at 131.

44. See Driggers, Jr., *supra* note 6, at 1228-31.

45. See Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 70 (2001) (noting that six states use the federal appointment system).

46. See Zeidman, *supra* note 34, at 791 (noting that of the 8,500 trial judges, 24 percent are appointed, 43 percent are elected in partisan elections and 33 percent are elected in nonpartisan elections. “Of the . . . more than 1200 state appellate judges, 47% are appointed, 40% face partisan elections, and 13% face non-partisan elections.”).

47. See Daugherty, *supra* note 22, at 340-41.

48. See, e.g., Diemer v. Carlson, 550 N.W.2d 875, 877 (Minn. 1996) (en banc) (challenge to gubernatorial interim appointment turned back, with the Court noting

pointed judges will have the advantage of incumbency in the following election, thus somewhat mimicking the Missouri Plan in effect if not exactly in form.⁴⁹ In some of these states, sitting judges frequently retire before the end of their terms, sometimes to permit the governor to appoint their successors rather than leaving the seat open for a contested election without an incumbent.⁵⁰ Whether they do so because they believe that the merit selection commission can better evaluate judicial character than the public, or whether they hope that the merit selection commission will more likely mimic their own ideological leanings in selecting the next judge, is less clear. However, not all judges are successful in smoothing the transition for their successors. Not long ago, for example, the Minnesota Supreme Court blocked a district judge's attempt to secure his successor through appointment by stepping down a couple of days before his term would have ended, and ordered the seat to go to election.⁵¹

What *White* has underscored is that the problems that have been associated with partisan judicial elections need to be addressed in states with non-partisan and retention elections as well. These problems are twofold: (i) the virtual impossibility of most candidates standing ethically for election in a money-driven system of electoral politics, raising concerns about the erosion of judicial impartiality and independence; and (ii) the concern for electioneering practices that detract from the dignity of the judicial office.

A. Financing Judicial Elections and Conflicts of Interest

Perhaps foremost on the minds of contemporary jurists, particularly at the state supreme court level, is how to finance judicial elections in a way that avoids compromising judicial integrity and independence. Setting aside the question of these compromises for a moment, we might marvel at the sheer amount of time and effort it takes to run for judge in many states in the new century. Elizabeth Amon, a reporter for the *National Law Journal*, noted that while most of the 2002 judicial elections "toned down their ugliness from two

that Minnesota Constitution Art VI, § 8, "does not merely authorize, but *mandates* the governor to appoint a qualified person to fill the vacancy until a successor is elected and qualified" and to serve until a successor is elected after a general election held at least one year after appointment).

49. See PATRICK M. MCFADDEN, AM. JUDICATURE SOC'Y, *ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS* 6 (1990); Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L.J. 281, 287 n.19 (1995); Champagne, *supra* note 34, at 66; Hill, Jr., *supra* note 22, at 347 (noting that 66 percent of all Texas judges between 1940-1962 were originally appointed and only ten of forty-five Supreme Court judges were elected to office from 1874-1962).

50. See W. St. John Garwood, *Judicial Revision—An Argument for the Merit Plan for Judicial Selection and Tenure*, 5 TEX. TECH L. REV. 1, 4-5 (1973).

51. See *Zettler v. Ventura*, 649 N.W.2d 846, 851 (Minn. 2002) (en banc).

years [earlier] . . . the cost of judicial elections remains high.”⁵² Indeed, the financial reports from the 2000 to 2004 judicial election seasons might make even judicial incumbents re-consider whether running for office is worth it.

The Brennan Center’s Justice at Stake Campaign report noted that in the 2000 campaign, state supreme court candidates raised a total of \$45.6 million, a 100 percent increase over 1994, and 61 percent over 1998.⁵³ On average, candidates for states’ highest courts raised \$430,529 each; and sixteen raised over \$1 million to fund their campaigns.⁵⁴ In *White*, Justice O’Connor noted that the thirteen candidates competing for five seats on the Alabama Supreme Court spent an average of \$1,092,076 in 2000.⁵⁵ Anecdotal reports suggest that judicial candidates in 2002 or 2004 fared little better. In the 2004 elections, the cost of TV ad campaigns for supreme court races rose to \$6 million by mid-October, over \$975,000 in 2002; and total interest-group campaign finances were at \$35 million by the same time, narrowing on the 2000 election.⁵⁶ Meanwhile, in 2002 the four candidates for Ohio’s Supreme Court raised \$6.2 million for their election, in addition to \$1.83 million spent by other interest groups in TV advertising and \$1 million raised by an Ohio Chamber of Commerce-backed group.⁵⁷ In 2004, \$5 million was raised in Illinois.⁵⁸

52. Elizabeth Amon, *State Judicial Races are Less Nasty—But Still Costly*, THE RECORDER (San Francisco), Oct. 29, 2002, at 3.

53. See DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 4 (Feb. 2002), available at <http://www.justiceatstake.org/files/JASMoneReport.pdf>; see also JUSTICE IN JEOPARDY, *supra* note 8, at 29 (noting spending patterns in 2000 and previous years, and indicating that spending is particularly high in states where tort reform or sensitive business interests are at stake).

54. See GOLDBERG ET AL., *supra* note 53, at 4; Hill, Jr., *supra* note 22, at 341 (describing the 250 percent increase in contributions to appellate races in Texas between 1980-86).

55. See Republican Party of Minn. v. White, 536 U.S. 765, 789 (2002) (O’Connor, J., concurring).

56. See Associated Press, *State Judicial Races See Record Spending*, Oct. 22, 2004 [hereinafter *State Judicial Races*] (noting that the number of states with judicial TV ads had grown from four to nine in two years and to fifteen states in four years); Emily Heller, *Judge Races Get Meaner; New Litigation Tactics, Hard Cash Mark Bench Battles*, NAT’L L. J., Oct. 25, 2004, at 1. Even trial courts were not immune. In 2002, the Miami Daily Business Review reported that “[a]n entry fee of about \$100,000 has emerged for serious contenders” for circuit court seats in South Florida. See Steve Ellman, *Runoffs Costly in Bids for Five Circuit Seats*, MIAMI DAILY BUS. REV., Nov. 4, 2002, at A1.

57. See Laura Bischoff, *Forum Slams High Court Elections*, DAYTON DAILY NEWS, Mar. 7, 2003, at B3, available at 2003 WL 5763751.

58. Heller, *supra* note 56. Justice O’Connor has also noted “that in 1995, one candidate for the Pennsylvania Supreme Court raised \$1,848,142 in campaign funds, and that in 1986, \$2,700,000 was spent on the race for Chief Justice of the Ohio Su-

The rise in election costs has been accompanied by campaign finance ethics problems that are not unlike those in other elections. The American Judicature Society reports on just some examples:

- One Florida bar association president received a call from a trial judge's campaign committee, a day before he was supposed to appear before that judge, thanking him for his endorsement but noting that no check was enclosed with the letter.

- Another judge, prohibited from attending fundraising events, attended a "testimonial" dinner and accepted \$10,000 for personal expenses and \$2,000 for his re-election campaign from attorneys appearing before him.

- Another trial judge accepted below-market-rate interest loans from a credit union to finance his judicial campaigns, permitted the loan to be structured to avoid interest for five years, and then reciprocated by ordering \$250,000 in minors' funds to be deposited with the credit union though credit unions had never been used for that purpose in this particular court before.⁵⁹

In fact, judicial elections in some states have become so expensive and suspect in the mind of the public that there are rising calls for public financing of judicial campaigns. In fall 2002, former Harvard president and law school dean Derek Bok called for public financing of judicial elections, noting the fact that over half of judges' campaign funds come from lawyers and law firms, raising the spectre of at least the appearance of corruption.⁶⁰ He noted that 75 percent of all cases coming before Wisconsin's Supreme Court in the decade ending in 1999 involved a lawyer, firm, or company that had contributed to one or more of its justices.⁶¹ His call has been echoed by Chief Justice Tom Phillips of the Texas Supreme Court, who has also argued that a better substitute for educating voters than traditional political advertising would be voters' guides prepared with free franking privileges by Congress.⁶²

preme Court." *White*, 536 U.S. at 789 (O'Connor, J., concurring). Michigan's state Supreme Court justices who won re-election in 2002 together raised more than \$800,000. *Court Elections: Use Tax Dollars to Finance Statewide Judicial Campaigns*, LANSING ST. J., Nov. 29, 2002, at 12A, available at 2002 WL 103552732 [hereinafter *Court Elections*].

59. See SARA MATHIAS, AM. JUDICATURE SOC'Y, *ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS* 47, 54 (1990).

60. See Derek Bok, *Too Many Beholden Judges*, 26 NAT'L L.J., Nov. 25, 2002, at A8.

61. *Id.* But see JUSTICE IN JEOPARDY, *supra* note 8, at 31 (noting that in some states, there is little correlation between donors and those who come before state appellate courts). The ABA Report also notes that 29 percent of contributions in 1989-2000 judicial campaigns came from lawyers, and almost 20 percent from business. *Id.* at 30. But see Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 296-97 (2002) (noting that public financing can be too little for effective campaigning).

62. See Phillips, *supra* note 21, at 146.

Some states have reacted to financing problems by going directly to the perceived source of the problem: money. North Carolina became the first state in the nation to provide appellate candidates public funding if they agree to fundraising and spending limits.⁶³ The Michigan state bar has similarly called for publicly funded judicial elections,⁶⁴ and there are other proposals underway for changing the financing system for judicial elections.⁶⁵ More tellingly, even elected judges have gotten on the bandwagon for more drastic changes to their states' judicial selection systems. For example, in November 2002, Justice Phillips, the survivor of several judicial elections in a state known for \$1 million war-chests for supreme court justices,⁶⁶ called for Texas to turn to an appointment system, expressing his belief that partisan elections are "embarrassing and wrong-headed."⁶⁷

The anecdotal evidence on judicial elections spotlights four sorts of conflicts of interest that may occur in the course of judicial elections: *quid pro quo* conflicts, judicial punishment for non-support, the creation of "soft" obligations on behalf of litigants and lawyers, and the public appearance of impropriety. Direct *quid pro quo* conflicts where judges promise specific litigants specific results in cases that come before them are perhaps the easiest concerns to dismiss. The *White* case suggests, without deciding, that such conflicts will continue to be sanctionable under any reading of the First

63. See Governor Mike Easley Signs Judicial Campaign Reform Act, U.S. NEWswire, Oct. 10, 2002, available at 2002 WL 22072620.

64. See *Court Elections*, *supra* note 58, at 12. An additional concern in elections involves fundraising violations. See, e.g., JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 348, 356 (1990) (noting ethics violations for contribution solicitations, and using campaign contributions for personal expenses).

65. See Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1467, 1481 (2001) (noting that public financing programs had been introduced in over twenty states as of 2001, and enacted in Arizona, Massachusetts, Maine, and Vermont, but that "only Wisconsin had made a serious effort to fund judicial races"). See also MCFADDEN, *supra* note 49, at 122-24 (describing public financing, pooled funding, and race-by-race funding agreements); Behrens & Silverman, *supra* note 61, at 296 (noting calls by the American Bar Association and others for campaign finance reform).

66. See, e.g., Chuck Lindell, *Judge: Throw Politics Out of the Court; Texas Chief Justice Goes National in Longtime Campaign to Change State Judicial Elections*, AUSTIN AMERICAN-STATESMAN, Aug. 10, 2002, at B1, available at 2002 WL 24076020.

67. See David Pasztor, *Should Texas Elect its Judges? No, Says Chief Justice, Who's Leading Push to Cut Partisan Politics*, AUSTIN AMERICAN-STATESMAN, Dec. 2, 2002, at A1, available at 2002 WL 101146481; see also Hill, Jr., *supra* note 22, at 339 (noting that he was resigning so that he could be involved in judicial selection reform).

Amendment, because they violate the state's legitimate interest in impartiality.⁶⁸

However, judicial promise-for-benefit cases are not the only *quid pro quo*-like cases that should concern the public, and they are certainly not the ones that most concern the bar. The second sort of conflict is illustrated by a dispute that arose in a Nevada district court race, where the defeated incumbent, Judge Jeffrey Sobel, charged that his successor was pressuring Sobel's supporters who would be appearing before the new judge for money to pay off her campaign debt.⁶⁹ Or we might consider the case of Magistrate Judge Dan Tennant, who was disciplined for approaching two litigant attorneys in a bar, letting them know that five hundred dollars was considered the "going rate" for lawyer contributions to his campaign, and threatening one repeatedly with negative rulings if he did not "pay up."⁷⁰ These cases illustrate that sitting judges may use the implied threat of negative rulings as a means of squeezing money out of lawyers who come before them on a regular basis, or successful judicial candidates may "punish" lawyers who support an opponent by later adverse rulings.

While blatant *quid pro quo* may seem an unusual occurrence that should not drive electioneering rules, the threat of judicial retaliation is perhaps not so ill-founded when one considers how careful many attorneys are to cater to judges' prejudices and preferences in order to "stay on the good side" of the judge. Moreover, it may be easier to find direct evidence that contributions positively influenced a judge's actions on a case than to prove that failure to contribute to a judge's campaign resulted in his negative action against a lawyer or opponent, unless there is a pattern of rulings that are inexplicable on any other basis. Such a pattern will be difficult to make in many of the cases in the trial courts where judicial discretion is the order of the day. Judges themselves may not be aware that in a close case, they are harboring resentments about lawyers because of their election year decisions. Indeed, even if the judge is herself actually beyond reproach on these matters, lawyers may well *think* that they have to "pay to play."⁷¹

68. See *Republican Party of Minn. v. White*, 536 U.S. 765, 769-77 (2002) (noting that the "announce clause" does not further a state interest in impartiality read as bias toward individual parties because it does not restrict speech about parties, just about issues).

69. See Judy Odierna, *Judge Alleges That Successor Going After His Supporters*, LAS VEGAS SUN, Nov. 20, 2002, at 1, available at 2002 WL 101211300.

70. See *In re Tennant*, 516 S.E.2d 496, 498-99 (W. Va. 1999).

71. "Pay to play" technically refers to *quid pro quo* contributions given by attorneys in hopes of getting legal work from a government attorney or judge. See *In re Cendant Corp. Litig.*, 264 F.3d 201, 270 (3d Cir. 2001). The ABA recommended prohibition of such activity in a new proposed Rule 7.6 to the ABA Model Code of Professional Conduct. See *ABA Votes to Prohibit "Pay to Play"*, MISCELLANEOUS MEMO (ABA Div. for Bar Servs.), Apr. 12, 2000, at 2, available at <http://www.abanet.org/barserv/mm/memo86.pdf>. However, it may also refer to attor-

A third, and more common, sort of conflict arises when a litigant's or lawyer's assistance to a judicial candidate may create an unspoken sense of obligation on the part of the judge, even if no direct promise is made. Since it is difficult enough to prosecute *quid pro quo* cases,⁷² one might imagine that it would be very hard for a state to write a specific enough ethics code to define when creating an unspoken sense of obligation may unethically influence a judge's opinion in specific cases.⁷³

More to the point, the current electoral remedy to prevent the creation of such unspoken obligations—financial disclosure accompanied by public pressure on candidates who take “special interest money” to avoid catering to special interests—would not seem to work as well for judges. For one thing, given the low level of voter interest in judicial elections, it is unclear whether, in the past, judicial campaign finance disclosures have been seriously scrutinized by anyone except the judges' opponents.⁷⁴ Second, the usual remedy available to deal with influence-buying—public pressure on candidates not to vote for contributors' pet projects—would seem inappropriate as applied to a judge. We should not have more confidence in the independence of the judiciary if a judge were pressured by the public to vote against an attorney's

neys' views that if they are going to be taken seriously in court, they must contribute to the incumbent judge's campaign. See TEXANS FOR PUBLIC JUSTICE, PAY TO PLAY: HOW BIG MONEY BUYS ACCESS TO THE TEXAS SUPREME COURT 8, 10, 13 (Apr. 2001), available at <http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm> (noting that Texas Supreme Court justices were four times more likely to accept an appeal filed by a campaign contributor, 7.5 times more likely to accept appeals from \$100,000 contributors and ten times more likely for \$250,000 or more contributors. Chief Justice Phillips' former firm, which contributed more than \$250,000, had 74 percent of its appeals accepted.).

72. For example, only the direct promise of performance of a public duty in exchange for a benefit gives rise to an actionable criminal complaint under the Hobbs Act. *Wurster v. State*, 708 N.E.2d 587, 594 (Ind. Ct. App. 1999).

73. Justice O'Connor, for example, cites California Justice Grodin's admission that he was not sure whether his “votes in ‘critical cases’ during 1986 were not influenced subconsciously by his awareness that the outcomes could affect his chances in the retention elections being conducted that year.” *White*, 536 U.S. at 791-92 (O'Connor, J., concurring) (citing Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988)).

74. See also *Gilbert v. DaimlerChrysler Corp.*, 669 N.W.2d. 265 (Mich. 2003) (justice denying recusal motion because of a contribution he received, excoriated judicial elections). There are a few judicial elections cases involving failure to properly disclose financial contributions. In *State Board of Ethics v. Ourso*, 842 So. 2d 346 (La. 2003), a judicial candidate was disciplined for receiving loans in excess of judicial campaign contribution limits. *Id.* at 352. See also *In re Hughes*, 874 So.2d 746, 752-58 (La. 2004) (judge sanctioned for numerous ethical violations, including failing to file required campaign disclosure reports as well as numerous failures as an attorney to follow through with representation for clients and egregious administrative errors).

client because the attorney contributed to his campaign; and a judge's decision to bend over backwards not to rule for a contributing attorney or client so it would not later *appear* that he had been influenced by money would serve justice no better.

Hence, the broad prophylactic rules governing judicial financing of campaigns seem to make significant sense. They include provisions that drastically limit contributions,⁷⁵ which, although controversial, have been held to be constitutional in at least some challenges, unlike expenditure limits, which have not.⁷⁶ More controversially, some financing rules provide that certain entities cannot contribute to judicial campaigns.⁷⁷ And perhaps the most constitutionally suspect rule is commonly employed in nonpartisan election states, and modeled on the ABA Code. It requires that judicial campaigns erect a screen so that judges do not know where their election contributions are coming from.⁷⁸

The final sort of conflict problem, which the Supreme Court purported to take seriously but declined to resolve,⁷⁹ is that suggested by the national survey on judges' impartiality cited by Bok. That survey showed that 77 percent of members of the public believed that "elected judges are influenced by having to raise campaign funds."⁸⁰ Norman Krivosha has noted that the pro-

75. See MATHIAS, *supra* note 59, at 51 (noting general caps on campaign contributions that apply also to judges); SHAMAN ET AL., *supra* note 64, at 353 (noting that Michigan committees are limited to \$100 contributions per person and that other states limit amounts of contributions).

76. See, e.g., *Suster v. Marshall*, 951 F. Supp. 693, 700 (N.D. Ohio 1996) (striking down \$75,000 campaign expenditure limit for judicial campaigns while noting that under Supreme Court precedent, limiting contributions may be permissible), *aff'd*, 149 F3d 523 (6th Cir. 1998).

77. See SHAMAN ET AL., *supra* note 64, at 353 (noting that Ohio limits persons who can contribute to campaigns).

78. However, the "screen" may be defeated by legislation designed to further open government by requiring judicial candidates to file public statements of the source of their contributions. Moreover, *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), may have put campaign fund screen provisions in question by holding unconstitutional ethics rules forbidding judicial candidates from personally soliciting campaign contributions and public support, but permitting the candidate's election committee to do so. However, the *Weaver* court based its decision on the argument that the risk that fundraising will influence a judge's contributions is not lessened by assigning the fundraising role to supporters, since the candidate will still know who helped them get elected. *Id.* at 1322-23.

79. See *Republican Party of Minn. v. White*, 536 U.S. 765, 789-92 (O'Connor, J., concurring) (noting the substantial funds needed for judicial campaigning and the problem that reliance on donations "may leave judges feeling indebted to certain parties or interest groups").

80. Bok, *supra* note 60; see also *White*, 536 U.S. at 790 (O'Connor, J., concurring) (noting that "[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay cam-

ject of getting enough votes to be elected inevitably results in voter identification of judges with special interest groups.⁸¹ As judicial election codes start mimicking federal and state codes governing other elections, with their heavy emphasis on public disclosure of campaign contributions,⁸² press and public attention is more likely to focus on who has contributed to certain judges, and which judges are sitting on cases involving these litigants. A public that sees the same fundraising patterns emerging in judicial elections as in other elections, where favors are more traditionally exchanged, is likely to *assume* that there is corruption, even when there is none. Thus, more spotlighting of what really goes on may serve to reinforce, rather than diminish, feelings of resentment and suspicion on the part of the electorate.

When lawyers are the chief source of election funds for judicial candidates, the most clearcut solution to the appearance of impropriety—judicial recusal—is not always a viable option. Parties can sometimes change venue in trial courts if they fear retaliation or favoritism by a particular judge, but that option creates significant burdens for lawyers and litigants if the feared judge is the only one in a particular county or on a single district bench. Moreover, in state appellate courts, on some cases involving major state business issues, for example, it would be very difficult to find a full bench of justices if everyone who took campaign contributions from either of the litigants or one of their lawyers had to recuse herself.⁸³

B. Judicial Independence and Catering to Voter Community Wishes

Closely aligned with the problem of these direct conflicts of interests is the question of judicial independence, i.e., the ability to make a decision based on the law and not on community wishes or party preferences. *White*

paign contributors is likely to undermine the public's confidence in the judiciary" and describing surveys indicating that between 66 and 76 percent of voters believe that campaign contributions buy favorable treatment for litigants and lawyers.) Justice O'Connor also referenced stories of lawyers who felt that their contributions influenced their success. *Id.* (citing David Barnhizer, "On the Make": *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 379 (2001)); JUSTICE IN JEOPARDY, *supra* note 8, at 31-32 (citing numerous national and state studies of voters that showed that between 72 and 90 percent of voters assume that campaign contributions exerted influence on judicial decisions). *See also* Hill, *supra* note 22, at 343 (noting Texas attorneys' beliefs that some attorneys were engaging in "quasi-bribery" to influence elections).

81. Krivosha, *supra* note 26, at 132.

82. *See, e.g., Implementing Recommendations*, *supra* note 11, at 946 (recommending centralization of campaign finance disclosure information).

83. *See, e.g., MATHIAS*, *supra* note 59, at 47 (noting Texaco-Pennzoil litigation in which both parties and their attorneys, by the time their case reached the Texas Supreme Court, had contributed over \$388,000 to Supreme Court justices, including three who were not up for re-election. The smaller contributor, Texaco, lost the appeal.).

muddies the waters about how stringent judicial election codes can be in preventing candidates from making "pledges or promises" or restricting candidates' relationships with political parties and supporters without running afoul of the Constitution.⁸⁴

Of great concern among judicial election-watchers after *White* is that judicial candidates may run on issues in ways that may compromise their judicial independence, suggesting, if not outright stating, that they will rule on certain issues in certain ways. The cases to date suggest that the only option framers of judicial elections codes may have is to ban results that are clearly within their mandate, e.g., direct promises on specific issues made to get

84. See *White*, 536 U.S. at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting) for the proposition that "[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.") (alterations in original). See also *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 354 F. Supp. 2d 672 (E.D. Ky. 2004) (invalidating Kentucky's pledges or promises canon, citing *White*, but upholding its recusal canon); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72 (N.D.N.Y. 2003) (invalidating canons prohibiting judicial candidates from endorsing other candidates, making political speeches, attending political meetings, and assisting in political campaigns), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 2812 (2004). But see *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003) (per curiam) (holding *White* distinguishable in constitutional challenge to judicial ethics canons prohibiting candidates from contributing to joint candidate expenditure accounts, serving on a phone bank for a legislative candidate, and participating in a meeting screening other judicial and non-judicial candidates). In *Raab*, the court noted that New York permits judicial candidates to participate in and contribute to their own campaigns for nine months before the primary, including attending political gatherings and speaking, campaigning, and attending political function. *Id.* at 1292. Because the limitation against cross-campaign contributions was intended to ensure that political parties could not extract money from judicial candidates seeking endorsement and thus "buy and sell" judicial nominations, it furthered the state's interest against both corruption and the appearance of corruption. *Id.* See also *In re Dunleavy*, 838 A.2d 338, 348 (Me. 2003) (holding that judge could be sanctioned for soliciting funds for the Maine Clean Elections Fund to qualify for public financing of a non-judicial office in violation of Canon 5(A)(a)(1)(e), which seeks to prevent the corruption or appearance of corruption of the judicial process by preventing political solicitations). *Dunleavy* rejected a *White* challenge because the non-solicitation provision was narrowly tailored to prevent the riskiest conduct, e.g., solicitation of support for political candidates and organizations, including through purchase of tickets to political functions. *Id.* at 351. In the court's view, this kind of activity created bias, or the appearance of bias, for parties in lawsuits, because of the appearance that the judge would favor the contributor or punish the non-contributor. *Id.* The court noted that this provision only applied to sitting judges, not political candidates. *Id.*

votes followed by consonant rulings in such cases.⁸⁵ It is also inevitable, as candidates push the envelope, that the higher courts will be embroiled in the minutiae of distinguishing valid "announcements" from invalid "commitments" or "promises," involving many context-specific decisions about when a candidate has acted improperly.

A portent for the future is *In re Watson*,⁸⁶ decided after *White*. In that case, the court essentially had to determine whether a candidate's statements that he would "assist" the police, and "work with the police, not against them. . . as they aggressively work towards cleaning up our city streets" to help the city "establish a reputation for zero tolerance" for criminals constituted an "announcement" of views protected under *White*, or a "pledge or promise" to which the *White* opinion did not extend.⁸⁷ The court held that, unlike a previous candidate's statement that he was a "law and order candidate" that was protected by *White*, Judge Watson's statements were "pledges or promises" that could constitutionally be prohibited by the rules.⁸⁸

In some cases, the problem facing courts is whether "pledges or promises" are even relevant to the state's interests in judicial independence and

85. See, e.g., *Suster v. Marshall*, 951 F. Supp. 693, 700 (N.D. Ohio 1996), *aff'd*, 149 F.3d 523 (6th Cir. 1998); *Deters v. Judicial Ret. & Removal Comm'n of Ky.*, 873 S.W.2d 200, 201 (Ky. 1994). But see *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004) (invalidating Kentucky's "pledges or promises" canon).

86. 794 N.E.2d 1 (N.Y. 2003) (per curiam).

87. *Id.* at 2-5.

88. *Id.* at 4-5; see also *In re Spencer*, 759 N.E.2d 1064 (Ind. 2001) (finding that a judge's advertisement of his fulfillment of a previous campaign promise to send more people to jail violated the clause); *In re Haan*, 676 N.E.2d 740 (Ind. 1997) (holding that statements that a candidate would stop suspending sentences or putting defendants on probation were a violation of the pledges/promises clause); GASS, *supra* note 3, at 11-12 (describing cases where there were difficulties in distinguishing pledges from statements). But see *In re Shanley*, 774 N.E.2d 735, 737 (N.Y. 2002) (where the court held that Shanley did not commit judicial misconduct because a single phrase such as "law and order candidate" did not promise "stern treatment of criminal defendants," but rather was "widely and indiscriminately used in everyday parlance and election campaigns" and did not carry "a representation that compromises judicial impartiality"). Compare *In re Judicial Campaign Complaint Against Burick*, 705 N.E.2d 422, 425, 429 (Ohio 1999) (holding that judge who said she favored the death penalty and "isn't afraid to use it" violated Canon 7's "pledges or promises" provision) with *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991) (holding that judge's criticism of "the firemen's rule," laws prohibiting felons from carrying firearms, and the existing judicial review standard for worker's compensation case, did not constitute a "pledge or promise" violating the code). Pledges to better administer courts, use computers to increase efficiency, reduce court costs, ensure effective discipline for juveniles in the system, and hear case matters oneself have been held permissible, while pledges to favor specific groups, employ a strict sentencing philosophy for drunk drivers, or not allow plea bargaining have been held improper. Cafferata, *supra* note 11, at 1643.

thus sanctionable. For example, in *Deters*, a trial court judicial candidate was charged with violations of the Code of Judicial Conduct provision against announcing his position on issues because he had advertised himself to be pro-life.⁸⁹ Debate ensued about whether this was an announcement on an issue "likely to come before" him under the rules.⁹⁰ Deters pointed out that he was unlikely ever to have to rule on whether abortion restrictions were constitutional,⁹¹ so that his announcement was irrelevant to the state's interests. The Court held that the candidate's announcement did implicate issues "likely to come before the court," pointing out that his pro-life attitude would surely influence some of his judicial tasks, including juvenile abortion by-pass cases, abortion protest cases and other matters such as the removal of respirators from dying patients.⁹²

Indeed, the lack of clarity on the difference between announcements and pledges or promises also makes it possible for candidates to use the canons aggressively to file complaints against judges who make the slightest mistake in describing their views, or even those who are careful to make nuanced statements. Imagine the surprise of candidate Runyon, who had to defend a complaint because a reporter revised his statement that "I would run a court that views convicted felons from the standpoint that they are going to be incarcerated. The penalty is the best and first way of dealings with felons" to read "Runyon vows to uphold Henderson's tradition, saying he would put all convicted felons in prison," thus making him liable to a "pledges or promises" charge.⁹³

An additional concern for judicial campaigners in a situation where robust free speech is permitted is that third-party partisan groups may succeed in exerting pressure on judges to answer questions even when they believe it is improper, for fear that they will be characterized as non-responsive or not forthright. A chilling portent is *Family Trust Foundation of Kentucky, Inc. v.*

89. See, e.g., *Deters v. Judicial Ret. & Removal Comm'n*, 873 S.W.2d 200, 201 (Ky. 1994).

90. *Id.* at 203.

91. *Id.* Deters unsuccessfully argued that because the only two hospitals in the county were Catholic, there had been no abortion-related cases in the county for over a decade, and no private physicians would have hospital backup for an office procedure, abortion was not a case that was likely to come before him, especially given the strongly Catholic composition of the county and the availability of abortion services in nearby Cincinnati. *Id.*

92. *Id.*

93. *In re Judicial Campaign Complaint Against Runyan*, 707 N.E.2d 580, 581-83 (Ohio Comm'n of Judges 1999) (holding that the statements differed and that the original statement was not a pledge or promise). See also *In re Miller*, 759 A.2d 455, 463 (Pa. Ct. Judicial Discipline 2000) (holding that a part-time district judge's reference to himself as a "judge" in campaign literature was not a misrepresentation because, as his opponent charged, he did not indicate that he was a judge of the Court of Common Pleas).

Wolnitzek,⁹⁴ in which a conservative organization was granted an injunction permitting judges to answer its questionnaire asking judicial candidates to name the President and Supreme Court Justice most analogous to their views, and to give their views on same-sex marriage, human embryo experimentation, the Ten Commandments in public spaces, and the raising of the minimum age to work in a strip club.⁹⁵

C. Judicial Advertising and Misleading Voters

"Attack advertising" reached new lows in 2004. Among the claims that popped up in an "unprecedented" fifteen states were the following: A West Virginia Supreme Court judge was accused in TV advertising of being a liberal and letting a sex offender go free because he voted to uphold an appeal by a sex offender who was seeking another chance at probation. In Ohio, voters received phone calls implying that a supreme court candidate, Judge Nancy Fuerst, had freed rapists and murderers after only six months in jail, a claim the judge asked her opponent to denounce.⁹⁶

Cases such as Judge Patricia Kinsey's attempts to smear her opponent suggest a concern beyond improper pressure on judges to take positions at all: they raise the worry that judicial candidates will adopt standard campaign practices that distort their opponents' views or rulings in order to get elected.⁹⁷ Even some judicial advertising that focuses on issues relevant to judicial character and competence often inflates or even deceitfully distorts the facts. For example, while a judge's penchant for hard work is clearly an important consideration in re-electing him, a campaign ad that accused a sitting judge of treating crime "like a part-time problem" because he had "averaged only 14 hours a week on the bench" and took "84 days off from court" was properly determined misleading because it suggested that the judge's in-

94. 345 F. Supp. 2d 672 (E.D. Ky. 2004).

95. *Id.* (holding the "pledges or promises" canon unconstitutional). Although the case was decided on mootness grounds, another such case was *Christian Coalition of Alabama v. Cole*, 355 F.3d 1288 (11th Cir. 2004), in which the Coalition attempted to seek an injunction of a judicial commission's ethics opinion that candidates should not answer the CCA's survey, which covered issues such as the candidates' views on abortion, gun control, and the role of religion in judicial decisions. *Id.* at 1292-93. See also Goessling, *supra* note 30, at 4 (arguing that judges should answer Christian Coalitions' survey asking them to comment upon Supreme Court opinions dealing with prayer at graduation, homosexual conduct, and education-related matters).

96. *State Judicial Races*, *supra* note 56. The Brennan Center termed the West Virginia ads "the nastiest in the nation." *Id.* The ABA has noted the dramatic rise in misleading "attack" advertising, particularly by third party groups. See JUSTICE IN JEOPARDY, *supra* note 8, at 34-35 (citing high amount of third-party advertising and numerous attack ads by third-party groups).

97. See *In re Kinsey*, 842 So. 2d 77 (Fla. 2003).

chambers work was "time off."⁹⁸ By contrast, even misleading ads can end up being protected: as an example, one might see the ad in *Chmura*, where the investigation of a single court employee for illegal kickbacks was portrayed in the following way: "Federal officers are looking into charges that the 37th District Court Probation department was running a scam under which court employees were receiving kickbacks, making big money off people's misery."⁹⁹

Simplifications of court processes and law are a standard form of campaign advertising misrepresentation. In *Riley*, the Arizona Supreme Court disciplined a candidate for criticizing an incumbent's decision, even though the incumbent judge had no discretion to decide the opposite way under appellate court rulings.¹⁰⁰ Similarly, in *Burick*, a candidate misrepresented the standard process of criminal plea bargaining by implying that a judge had himself decided to sentence a convicted repeat rapist to a lenient term instead of explaining that he had accepted a plea bargain to a lesser charge.¹⁰¹ Other candidates have criticized an incumbent judge for the high costs of the local court, which the incumbent had no real control over, or suggested that a judge was a political appointee when he was appointed by a merit selection process.¹⁰² Still another problem is candidates who overstate their endorsements,

98. See *In re McMillan*, 797 So. 2d 560, 567-68 (Fla. 2001); *In re Judicial Campaign Complaint Against Hildebrandt*, 675 N.E.2d 889, 890-91 (Ohio Comm'n of Judges 1997) (holding that an advertisement stating that a candidate had voted to end the death penalty and "ran for judge, then dropped out, then ran for Congress and lost" was misleading and sanctionable).

99. *In re Chmura*, 626 N.W.2d 876, 896 (Mich. 2001). Interestingly, the Court did not think this charge was punishable. In the court's view, the substance of the charge was not made false because the representation extended to more than the one person actually being investigated. *Id.* at 891. The court also rejected allegedly misleading statements against Mayor Coleman Young because they were not false statements of fact. *Id.* at 888-90.

100. MCFADDEN, *supra* note 49, at 78 (citing *In re Riley*, 691 P.2d 695, 704 (Ariz. 1984)).

101. See *In re Judicial Campaign Complaint Against Burick*, 705 N.E.2d 422, 427 (Ohio Comm'n of Judges 1999). Burick made this claim despite knowing that the defendant in question had plea-bargained to only one count of sexual battery and had received the maximum sentence for this crime. *Id.* The court held that Burick's statements were misleading and sanctionable. *Id.*

102. See *Bundlie v. Christensen*, 276 N.W.2d 69, 70 (Minn. 1979); *Burick*, 705 N.E.2d at 425 (candidate who said that an incumbent judge was appointed by "political bosses" rather than by the governor pursuant to a statutory process was disciplined for misrepresentation); MCFADDEN, *supra* note 49, at 77-78 (citing *In re Baker*, 542 P.2d 701, 706 (Kan. 1975)); see also *In re Judicial Campaign Complaint Against Kienzle*, 708 N.E.2d 800, 800-02 (Ohio Comm'n of Judges 1999) (holding that candidate could be sanctioned for the false or deceiving statement that a judge had "imposed \$430,000 in taxes" on county residents because of a court ruling he had issued on a government case).

indicating that they are endorsed by "the legal community" or the police when only one such local organization has endorsed them.¹⁰³

Moreover, given the current trend toward single-issue campaigning by third-party interest groups documented in the ABA report, *Justice in Jeopardy*,¹⁰⁴ a candidate's focus on one or two hot-button political issues may mislead voters in another way. Single-issue voting for a candidate may be counterproductive if the candidate is otherwise incompetent or has flaky or naïve views on other issues that will constitute the bulk of his job. For example, a decision to vote for a judicial candidate based on his stand on the death penalty is unlikely to be a good placeholder for a judge's real qualifications, e.g., his legal and trial experience, personal characteristics which exhibit a "judicial demeanor," his ability to run a courtroom well, and what he knows about issues that are likely to come before him every day.

Bar attempts to clamp down on false or misleading advertising may prove to be little more successful than attempts to prevent candidates from "announcing." In *Weaver v. Bonner*,¹⁰⁵ the 11th Circuit Court of Appeals recently employed *White*'s First Amendment strict scrutiny test to invalidate as overbroad an ethics canon on misrepresentations by judicial candidates.¹⁰⁶ Weaver claimed in brochures and TV ads, in a way that the lower court held clearly stretched the truth, that his incumbent opponent "would require the State to license same-sex marriages," "has referred to traditional moral standards as 'pathetic and disgraceful,'" "has called the electric chair 'silly,'" and "questioned the constitutionality of laws prohibiting sex with children under

103. See, e.g., *In re Judicial Campaign Complaint Against Grunda*, 798 N.E.2d 402 (Ohio 2003) (table) (holding that a candidate violated Canon 7 by identifying himself as a member of a political party by advertising stating "Endorsed Democrat," even though he could have legally used the phrase, "endorsed by the Democratic party"); *Burick*, 705 N.E.2d at 426-27 (holding that it was a Canon 7 violation to overstate a candidate's endorsements by claiming that the Fraternal Order of Police endorsed the candidate, when in fact only one local union branch had done so); *In re Judicial Campaign Complaint Against Roberts*, 675 N.E.2d 84 (Ohio Comm'n of Judges 1996) (holding that candidate's claim of endorsement by "the legal community" was false when only one county bar of the eight in the judicial district had endorsed him).

104. See JUSTICE IN JEOPARDY, *supra* note 8, at 24 (reciting one Tennessee governor's post-judicial election comment, "[s]hould a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I hope so.") (second alteration in original).

105. 309 F.3d 1312 (11th Cir. 2002).

106. *Id.* at 1319. See also *Butler v. Ala. Judicial Inquiry Comm'n*, 802 So. 2d 207, 215 (Ala. 2001) (similar holding); *In re Chmura*, 626 N.W.2d 876, 887 (Mich. 2001) (utilizing similar standard, the Court held that statements must be either literally true, or if they are inaccurate in some respects, they must be analyzed as a whole "to determine whether 'the substance, the gist, the sting' of the communication is true despite the inaccuracy," i.e., "whether the communication is substantially true." In either case, a judicial candidate cannot be sanctioned.).

fourteen.”¹⁰⁷ The court held that the canon, which prohibited “false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results,” needed to be more narrowly tailored.¹⁰⁸ Instead, the court employed the *New York Times Co. v. Sullivan* “actual malice” standard¹⁰⁹ that shields the press from civil damage claims in libel cases, as the constitutional standard for state judicial rules on false advertising.¹¹⁰

While the *Weaver* holding that the state’s rule lumping false and misleading statements with omissions and “created expectations” was overbroad as well as vague may make sense, the court’s antidote—requiring an actual malice standard—seems ill-conceived despite owing its pedigree to another elections case, *Brown v. Hartledge*. The purpose of the *Sullivan* standard is to encourage a robust press by giving ample room to good reporters to make occasional mistakes in the compelling public interest of receiving complete and varied versions of the news they need to make decisions as citizens and free persons.¹¹¹ *Brown* suggests that candidates need similar breathing room, and that factual blunders can be rectified by opponents.¹¹² However, it is not so clear that this will happen, or happen successfully, in judicial elections given how little attention voters pay to them. It is unclear what purpose is served by giving judicial candidates the room to make factual errors, even negligently, about their own record or their opponent’s. Indeed, one might be particularly concerned about the competence of a judge who is not careful to learn the truth or to distinguish what is fact from fiction.

Nevertheless, the *Weaver* case, along with other cases that have questioned or invalidated judicial canons limiting candidates’ right to associate with political parties and causes,¹¹³ raises the likelihood that judicial elections, whether they are nominally partisan, nonpartisan or retention-only evaluations, are likely to become more rowdy and divisive in years to come, a final concern of the bar.

107. See *Weaver*, 309 F.3d at 1316-17.

108. *Id.* at 1319-20. The Court adopted the actual malice standard from *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Brown v. Hartlage*, 456 U.S. 45 (1982), which requires proof of knowledge that the campaign statements were false or that they were made in reckless disregard of the truth. But see *In re Kinsey*, 842 So. 2d 77 (Fla. 2003) (imposing discipline on a judicial candidate who was engaged in “conduct unbecoming a candidate for a judicial post” and upholding rules prohibiting judicial commitments on cases or issues).

109. *New York Times Co.*, 376 U.S. at 279-80.

110. *Weaver*, 309 F.3d at 1318-19.

111. *New York Times Co.*, 376 U.S. at 279-80.

112. *Weaver*, 309 F.3d at 1319-20 (citing *Brown*, 456 U.S. at 60-61).

113. See, e.g., *Unger v. Superior Court of S.F.*, 209 Cal. Rptr. 474 (Cal. 1984) (holding that prohibition against parties endorsing judicial candidates does not violate the First Amendment); GASS, *supra* note 3, at 1 (noting that in some cases, such as in North Carolina, canons are being amended under political pressure).

D. Judicial Elections and Judicial Decorum: An Oxymoron?

The cost of elections, with their potential for creating conflicts of interest or misleading voters, is only part of the problem. Concerns about the image of judges that candidates create in their campaigns have also begun to come to the fore. Few judges may try something as colorful as Town Justice Thomas Spargo did to win his seat: handing out coupons for free coffee, doughnuts, and gasoline; buying a round of drinks at a local bar after announcing that he was a candidate for judicial office; and supplying cider and donuts to citizens using the town dump and pizzas to local teachers and public employees.¹¹⁴ However, that is not to say that other judicial electioneering practices are not as hair-raising. In a disciplinary proceeding brought against Associate Justice Harold See for his campaign practices, dissenting Justice Houston referenced TV and mail political accusations in the 1994 and 1996 Alabama judicial elections, which variously claimed that one judicial candidate "was a co-conspirator to murder; that another was looking and acting like a skunk; and that one was an adulterer and had engaged in licentious conduct."¹¹⁵ One Nevada judge was charged but never disciplined for portraying his opponent as "an animal" and a "monster."¹¹⁶

114. *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 79 (N.D.N.Y. 2003), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003), *cert denied*, 124 S. Ct. 2812 (2004). Spargo was also charged with failure to disclose an election contribution by one party in a contested case, making a ruckus while he supervised the 2000 presidential recount as a Republican observer, serving as a speaker at a Conservative Party fundraiser, and improperly paying consultants to his campaign. *Id.* at 80-81. The Spargo court struck down the canons preventing his political activity. *See Dimino, supra* note 22, at 328.

115. *Butler v. Ala. Judicial Inquiry Comm'n*, 802 So. 2d 207, 224 (Ala. 2001) (answering questions certified by federal court, which later dismissed the federal case). Interestingly, Justice See was the subject of a complaint for questioning Judge Roy Moore's sentencing record in drug cases. *Id.* at 210. In later developments, then-Justice Moore was himself unseated for refusing to follow a federal court order requiring him to take down a monument of the Ten Commandments he had surreptitiously placed in the Alabama courthouse. *See Lyle Denniston, 'Ten Commandments Judge' Ousted, Defied US Order to Remove Display*, BOSTON GLOBE, Nov. 14, 2003, at A3, available at http://www.boston.com/news/nation/washington/articles/2003/11/14/ten_commandments_judge_ousted/.

116. *In re Davis*, 946 P.2d 1033, 1052 (Nev. 1997) (Springer, J., dissenting). Interestingly enough, Justice Springer objected to the fact that this judge was not disciplined at all while Judge Davis was removed from office for, *inter alia*, borrowing money from court employees, endorsing another judicial candidate, borrowing money from the court fine account, playing songs such as "Jail House Rock" during arraignments, intimidating a car dealer who was late on delivering publicly ordered cars, asking his employees to provide personal services, violating zoning restrictions in the use of his property, and ordering criminal defendants to contribute to charities rather than paying court fines. *Id.* at 1036-37.

These cases graphically illustrate the concern of election foes that the decorum of the office will be impugned by traditional election tactics. If one of the dynamics in elections is voters' simultaneous need to adulate and resent their public officials, judicial candidates will always be subjected to the "double-bind" on electoral behavior: if they act "too judicially" they may not win the election because "clean" tactics don't win elections, but if they do not act "judicially enough" they may not win either. It is said of President Harding that he was elected because he "looked like a President," even though his administration turned out to be perhaps the most corrupt in history.¹¹⁷ So judges are expected to look the part even if that is inimical to robust campaigning.

Similarly, judges are expected to act decorously because of the nature of their office—to display little concern for self-interest, including their interest in being elected. Judges are expected to hold themselves somewhat above and aloof from the public, standing on their records rather than kissing babies or giving out doughnuts in a sycophantic attempt to win votes. As if they understand the expectations at work in this need to hold judges on a pedestal, most judicial candidates don't tend to campaign with their sleeves rolled up or display pictures of themselves digging in the dirt or coaching Little League as other politicians might, even if they find more indirect and seemingly more decorous ways of letting the public know that they have been active in the community. Similarly, symbols for all that is rational and detached in our society, they are not expected to display emotion in public by, for example, crying when their character is impeached by an opponent or responding vengefully to an aggressive campaign tactic. Yet, if all of these practices are the best way for politicians to get votes, judicial candidates who try to act "judicially" will lose elections.

Perhaps because of the increasing power of the broadcast media, the largest number of judicial elections conduct cases in the courts today¹¹⁸ seem to involve judicial advertising that uses "general inflammatory terms or 'buzzwords.'"¹¹⁹ Anthony Champagne describes how effective TV advertis-

117. See, e.g., Warren G. Harding, available at <http://www.whitehouse.gov/history/presidents/wh29.html> (last visited Sept. 10, 2004) (describing Harding's chief supporter's reason for backing him, and ensuing scandal).

118. See Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 669 (2002) (noting that judicial campaigns have undergone "dramatic transformation in recent years" due in part to advertising).

119. See *In re Judicial Campaign Complaint Against Hein*, 706 N.E.2d 34, 36-37 (Ohio Comm'n of Judges 1999) (holding that an opponent's statement that a judge was "liberal" and "soft on crime" was a misrepresentation in violation of Canon 7(B)(2)(f) despite the opponent's claim that he did not knowingly make a misrepresentation since that as his opinion). An unusual exception to the conservative bias in advertising claims is *Stretton v. Disciplinary Board of the Supreme Court*, 944 F.2d 137 (1991), in which the candidate wished to announce his views on, *inter alia*, the need for election of "activist" judges, the importance of the right to privacy, the need

ing has encouraged the use of dramatic and eye-catching political advertisements, that include "the use of talking trees, exploded tires and overturned vehicles, accusations that a candidate . . . is soft on pedophiles[,] and accusations that judges are corrupted by campaign money."¹²⁰ Studies as well as anecdotal evidence suggest that the direction of television advertising is toward "hard-hitting and negative" ads, particularly those that are put out by third-party interest groups, since their candidate does not suffer any backlash from their negativity.¹²¹

Cases and anecdotal reports seem to amply illustrate the worst fears of election opponents that voters will be swayed by irrational appeals to bias that have nothing to do with actual judicial responsibilities or character. For example, it appears that the primary method for challengers to successfully unseat an incumbent is by playing the "law-and-order" card, alleging that Judge So-and-so is "soft on crime" and that the advertiser will support law enforcement as a judge.¹²² Some illustrations of election ads geared to painting the advertiser as tough on crime:

- A campaign brochure that stated that incumbent judge "George Brown Gives Criminals a Good Deal," and that he "gives criminals such light sentences that of 91,000 cases, only 300 people have asked for a jury trial," thus (in the ethics commission's view) misleading the public about the effect of negotiated pleas on the number of cases actually tried.¹²³

- Misleading pamphlets accusing a judge of threatening to put a defendant's parents, who were victims of his harassing phone calls, in jail for coming to court to ask for justice while releasing the defendant; and accusing the

for greater focus on racism in the courts, and the necessary of hiring women and minorities among judicial personnel. *Id.* at 139.

120. See Champagne, *supra* note 118, at 672.

121. *Id.* at 673.

122. See, e.g., JUSTICE IN JEOPARDY, *supra* note 8, at 25-26 (documenting several campaigns where judges were challenged because they were "soft on crime," "coddling criminals," voted against the death penalty, or were portrayed as easy on child molesters); Champagne, *supra* note 118, at 677-78 (noting that of fifty-five ads studied, twenty-three presented a crime control message, and describing candidate ads suggesting that courts favor criminals over victims, that justices should not use technicalities to keep criminals on the streets, and that police officers are the champions of society); see also *Beshear v. Butt*, 773 F. Supp. 1229 (E.D. Ark. 1991), *rev'd on other grounds*, 966 F.2d 1248 (8th Cir. 1992) (in which a judge stated that plea bargains would not be allowed in his court was considered a violation of Canon 7(B)(1)(c) of the Code of Judicial Conduct, held to be a First Amendment problem on remand); *Hein*, 706 N.E.2d at 37; *In re Kaiser*, 759 P.2d 392, 396 (Wash. 1988) (en banc) (describing judge's tough record for DWI defendants, in violation of the "pledge or promise" clause). By contrast, courts have permitted candidates to announce themselves as "tough, no-nonsense judges," *id.*; or "law and order" types, *In re Shanley*, 774 N.E.2d 735, 736-37 (N.Y. 2002) (per curiam).

123. *In re McMillan*, 797 So. 2d 560, 564, 569 (Fla. 2001).

same Judge "Let 'em Go" Green of releasing a defendant on bond after he had attempted to strangle his wife.¹²⁴

• A not atypical prosecutor-judicial candidate's letter to law enforcement officials asking them to elect him to "put a real prosecutor on the bench," because "[w]e are in desperate need of a Judge who will work with the police, not against them. We need a judge who will assist our law enforcement officers as they aggressively work towards cleaning up our city streets."¹²⁵

As one might expect if one were assuming that judicial elections mimic other elections, the next two most frequent categories of single-issue advertising emphasize "family values" and civil litigation cases where big business is played off against "the little guy."¹²⁶ However, although they may be less frequent, judicial advertising campaigns also have misleadingly alleged that opponents back "ultra-liberal" issues such as same-sex marriage, and pushed the theme that judges are improperly "activist."¹²⁷

124. *In re Kinsey*, 842 So. 2d 77 (Fla. 2003). In fact, in the first case, after defendant Grover Heller was released on bond after a battering charge, and the parents returned to Judge Green to complain that he was harassing them with phone calls, Judge Green revoked the defendant's bond. *Id.* at 90. In the second case, a defendant who was out on bond later violated a restraining order by kicking down his wife's door and attempting to strangle her; Judge Green did not let defendant out on bond first as claimed. *Id.*

125. *In re Watson*, 794 N.E.2d 1, 2 (N.Y. 2003) (per curiam). An interesting exception involved two women candidates for judge, in which the advertiser alleged that her opponent, an incumbent judge, did not deserve to sit on the bench because she had said that a child in the juvenile system was "a loser." See *In re Judicial Campaign Complaint Against Morris*, 765 N.E.2d 580, 583 (Ohio Comm'n of Judges 1997) (holding that candidate's campaign broadcast was a knowing falsehood in violation of the canons). In fact, this statement was made by the judge when she was a lawyer of the child's parent in an emancipation hearing, not in her part-time judicial capacity. *Id.* It is particularly interesting that the two women both seemed to assume that demonizing the child was a sign of judicial incompetence, whereas all of the cases involving male candidates portray stigmatizing criminal defendants as a sign of judicial strength.

126. See JUSTICE IN JEOPARDY, *supra* note 8, at 26-28 (describing campaigns where third parties campaigned for or against candidates based on their "pro-business" or tort reform stance); Champagne, *supra* note 118, at 678-81 (noting that numerous ads focused on the advertiser's fighting for individuals or families against big corporations, or challengers being "for sale" to business or insurance industries). Champagne notes that family values themes, the third most important theme, featured ads for judges who were religious, who had been youth leaders, emphasizing that they would protect the state's families, or would make safer communities for families and children. *Id.* at 678-80. Two graphic ads featured three justices dancing in a business person's pocket, and two men with defective baby carriers, blaming Supreme Court justices who had decided a products liability case. *Id.* at 680-81.

127. See JUSTICE IN JEOPARDY, *supra* note 8, at 28 (describing campaigns waged against judges for their rulings on abortion, federal water rights, and school funding

These and other judicial ethics cases also sometimes raise questions about the integrity of a judge who seeks votes by pandering to one or both sides of a divisive issue that is not likely to come before him (or to be influenced by the way he votes). Judicial candidates may increasingly attempt to score points with voters by aligning their public personae with issues that are completely irrelevant to their qualifications for the job. It is not clear, for example, what to make of a judge who, immediately after his swearing-in, joins a pro-life rally and praises those who are lobbying the legislature on pro-life bills.¹²⁸ Should the voters assume that, since he is bound by *Roe v. Wade*, this personal affirmation of his views will not affect his decisions? Or should they assume that in abortion cases where the extension of *Roe* is involved, e.g., partial birth abortion or waiting period legislation cases, he will be influenced by his personal stands?

Similarly, an appellate judge who, representing himself as a Christian but not a judge, writes into a local paper opposing gay marriage on religious grounds¹²⁹ may be representing his legal views on the subject, or he may be well aware of the difference between what his moral beliefs entail and what his office requires. Or, take the case of Judge Wendell Griffin, who appeared before the Arkansas Legislative Black Caucus to denounce the firing of an African American coach and urge black legislators to "punish" the university

formulas); Maute, *supra* note 14, at 1213 (noting voters' demand to limit perceived activism). For examples, see *In re Kinsey*, 842 So. 2d 77, 80 (Fla. 2003) (judicial advertising that promised the protection of victim's rights and "putting criminals behind bars, not back on our streets"); Driggers, Jr., *supra* note 6, at 1217-18 (describing 1995 judicial election in the state legislature, in which the incumbent was charged with being "out of touch with the taxpayer," and someone who "sought to advance her [liberal] 'agenda' against the will of the people"). Maute notes that "[w]ith increased frequency, voters in judicial retention elections have voiced their demands to limit perceived, illegitimate activism by state courts." Maute, *supra* note 14, at 1213. Mark C. Miller has shown that nations such as England, France, and Japan, as well as Canada, which appoint their judges and/or have a relatively low level of articulation (e.g., the fewest actors involved in selecting judges) have fewer activist judges than countries like the U.S. that elect their judges and/or have high articulation systems (e.g., many actors who are involved in the selection of judges), a fact which appears to hold true among the different states in the U.S. as well. Mark C. Miller, *A Comparison of the Judicial Role in the United States and in Canada*, 22 SUFFOLK TRANSNAT'L L. REV. 1, 23-25 (1998).

128. *In re Sanders*, 955 P.2d 369, 374-75 (Wash. 1998) (holding that the judicial commission did not show by the requisite clear and convincing evidence that the justice threatened the integrity of the court or displayed the appearance of impropriety since he did not himself lobby on the bills or suggest that his judicial vote would be cast in a certain way).

129. Miss. Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006 (Miss. 2004) (holding that under the First Amendment, this judge could not be sanctioned for expressing his Christian values on gays in a personal letter to the editor and a subsequent interview).

for its racism.¹³⁰ Should the electorate take, on face value, his statement that he was appearing in his own capacity as an Arkansas alum and not as a judge?

Yet, especially after *White*, it is not clear exactly how detailed judicial election codes must be to pass constitutional muster while sparing the system from the robust sort of politicking that people expect of average politicians as well as more manipulative and borderline dishonest electioneering tactics. For example, in *Spargo*, the court struck down, as void for vagueness, ethics code provisions requiring judges to "uphold the integrity and independence of the judiciary," to "participate in establishing, maintaining and enforcing high standards of conduct, and [to] personally observe those standards so that the integrity and independence of the judiciary will be preserved."¹³¹ The *Spargo* court also held that provisions prohibiting partisan activity by judges, including other candidate endorsements, participation in others' campaigns, appearances at political gatherings, and political speechmaking were overbroad and impermissible prior restraints.¹³²

III. WHY JUDGES SHOULD NOT BE ELECTED: A VIRTUE APPROACH

Commentators have advanced a steady stream of public policy justifications for why judges should not be elected, at least in the traditional way. Many tout the virtues of Missouri-style appointment systems that seat judges

130. See, e.g., *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 130 S.W.3d 524, 525-27 (Ark. 2003). The complainant in Judge Griffen's case accused him of turning the firing into a "racist situation" and expressing "racist views" inline, as well as voting "in line [with] his racist views" in the Court of Appeals. *Id.* at 527. The court did not rule on the validity of the complaint, finding Canon 4C(1) constitutionally vague. *Id.* at 533-35. That Canon prohibits a judge from appearing at a public hearing "except on matters concerning the law, the legal system or the administration of justice." *Id.* at 528. Arkansas' Canon was first modeled after the 1972 ABA Model Code Canon 4B. *Id.* at 531. It was adopted in 1973 and readopted in 1988 with minor amendments. *Id.* at 531-32. In 1993, the Arkansas court adopted a new code, modeled after the ABA's 1990 code, with an exception permitting consultation with executive branch members or legislators "on pro se matters involving the judge's interests." *Id.* at 532.

131. *Spargo v. N.Y. St. Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 81, 90-91 (N.D.N.Y. 2003), *vacated on other grounds*, 351 F.3d 65 (2d Cir. 2003), *cert denied*, 124 S. Ct. 2812 (2004).

132. *Id.* at 88-89. *But see In re Angel*, 867 So. 2d 379, 381-83 (Fla. 2004) (holding that a judge who attended numerous Republican and Democratic gatherings, or had his family members attend, violated Canon 7, and could be disciplined; constitutional problems were not discussed in that case); *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003) (holding that the "pledges or promises" clause of Canon 7 was constitutional); *In re Judicial Campaign Complaint Against Keys*, 671 N.E.2d 1124, 1125 (Ohio Comm'n of Judges 1996) (holding that judges violated canons for lending their names once to the county recorder running for re-election).

of higher quality who are removed from political influence and tend to be more stable on the bench, while still permitting some democratic accountability.¹³³

I want to take a somewhat different tack: I want to suggest that most good judicial candidates do not have the virtues of good electoral candidates, and therefore, it is probably not a good idea to elect them. Of course, almost all election practices acts, as well as judicial canons about the conduct of judicial elections, begin with the usually unstated premise that there are some virtues we expect our public leaders to have. They should be honest, not liars. They should make their decisions based on the public good, not sell the power of their office to the highest bidder or distort their public actions for personal gain or based on private biases. Public leaders should be people of courage, trying to strike a proper balance between the immediate demands and concerns of the public and the long-range public good. These virtues are more likely to be directly spelled out in judicial codes than in election laws, but they underlie both.

However, the arguments against judicial elections, including those on impartiality and independence, usually come down to the view that judges running for office will sink to the level of other distasteful candidates—that is, they will engage in the vices of electoral politics just like other candidates do, and this will be especially hazardous to the proper performance of their office. We might want to ask a harder but better question: if judges have the abilities and moral character of good (or at least good enough) electoral candidates, will they also make good judges? I argue that they will not, that good electoral candidates do not make good judges.

A. Starting with a Full Account of the Importance of Virtues

In making my argument that good campaigners do not make good judges, I return with some modification to Alasdair MacIntyre's work on the role of the virtues in ensuring the excellent performance of vital social practices like judging. MacIntyre argues that virtues are important not in themselves, but because they are fitting for some particular practice which is aimed at a *telos* or end, here, the *telos* of justice. He has given one of the most well-known modern accounts of why the cultivation of virtue in public leaders is an important aspect of a healthy public culture. According to MacIntyre:

Every activity, every enquiry, every practice aims at some good
[h]uman beings move by nature towards a specific *telos*.

. . . [In Aristotle's account, the good for a man turns out to be] eudaimonia . . . blessedness, happiness, prosperity. It is the state of being

133. See Daugherty, *supra* note 22, at 319.

well and doing well in being well, of a man's being well-favored himself and in relation to the divine.

. . . [T]he exercise of the virtues is not . . . a means to the end of the good for man. . . . [it] is a necessary and central part of such a life.

. . . [Those founding a community or trying to achieve a common project] would need to value—to praise as excellences—those qualities of mind and character which would contribute to the realization of their common good or goods. That is, they would need to recognize a certain set of qualities as virtues and the corresponding set of defects as vices. They would also need however to identify certain types of action as [so harmful that] they destroy the bonds of community [and thus] render the . . . achieving of good impossible¹³⁴

MacIntyre's account enumerates many important facets of a search for the most important virtues of public leaders like judges. First, the virtues we seek in public servants, including judges, are defined by and focused on the good we seek in our community, and are not simply a prized abstraction. In this case, the legal system cannot function toward the *telos* of justice unless those who participate in it possess the virtues appropriate to that *telos*. The Biblical story of the unjust judge demonstrates how justice can be perverted if the person who is charged with the responsibility for doing justice does not himself have the character of justice.¹³⁵

This reality means that, while some virtues may have resonance for human community in virtually all times and places—Kant's experiment on truth-telling¹³⁶ is one attempt to demonstrate this—the priority of these virtues, and even their precise definition, will still be driven to some extent by context. As MacIntyre points out, how we exercise the virtues varies because "what it is to live the good life concretely varies from circumstance to circumstance even when it is one and the same conception of the good life and one and the same set of virtues which are being embodied in a human life."¹³⁷ This is not to say virtues are defined solely by a cost-benefit analysis, or on the theory that the ends justify the means.¹³⁸ Aristotle's and MacIntyre's conception assumes that the existence of virtuous persons in a society is a good,

134. MACINTYRE, *supra* note 9, at 148-51.

135. Luke 18:1-8.

136. See Amitai Etzioni, *The Good Society*, 1 SEATTLE J. FOR SOC. JUST. 83, 94-95 (2002); Bailey Kuklin, *Evolution, Politics and Law*, 38 VAL. U. L. REV. 1129, 1145-46 (2004).

137. MACINTYRE, *supra* note 9, at 220.

138. See *id.*

because it is a mark of the *eudemonia*, the state of living as a good person, that is critical in the good society.¹³⁹

To take one relevant illustration of the context-specific nature of the virtues, we might think about how commentators have remarked on the very different value Americans have placed on the virtue of honesty in politicians than Europeans or other cultures.¹⁴⁰ Indeed, foreign commentators were dumbfounded when President Bill Clinton was impeached, ostensibly for lying, because the ability to lie well is considered a sign of cleverness in some cultures, if not virtue.¹⁴¹ Yet, perhaps we should not be surprised that in a political culture that is essentially based on the need for complete and accurate information if every citizen is going to participate in politics, the virtue of honesty would be highly prized, as it clearly is in modern Supreme Court cases on freedom of speech.¹⁴²

Second, the virtues appropriate to any professional person are the virtues shaped by the practice in which he is engaged, which MacIntyre defines as

any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.¹⁴³

Thus, the virtues of a person involved in the practice of painting may well be different than the virtues of a person who is a judge. Or, more to the point of this Article, the virtues of a person who is attempting to achieve excellence in the practice of politics may be, and probably are, different from the virtues of a person who is attempting to achieve excellence in the practice of judging, even though both practices are necessary contributors to justice itself, and to the commonweal as a whole. And similarly, the vices or defects that are tolerable in a politician may not be tolerable in a judge, not because

139. *Id.* at 148, 151-52 (noting that *eudaimonia* means "blessedness, happiness, prosperity. It is the state of being well and doing well in being well, of a man's being well-favored himself and in relation to the divine.").

140. This insight came from Prof. Robert Cover, who taught one of my ethics classes in 1985. He discussed how the founding myth of George Washington and the cherry tree has shaped Americans' perception of the importance of honesty.

141. See Fehmi Koru, *New York Observations: America Impeaching its President*, *TURKISH DAILY NEWS*, Jan. 8, 1999; Martin Walker, *What Europeans Think of America*, *WORLD POLICY J.*, Summer 2000, at 26.

142. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

143. MACINTYRE, *supra* note 9, at 187.

judges are held to a "higher" standard, but because judges and politicians need to be measured by different standards.

Thus, the social role that the public official plays and the relationships in which her office is daily engaged form the basis for identifying the virtues appropriate to that role. In Homer's account, for example, virtues are what "enable[] someone to do exactly what their well-defined social role requires."¹⁴⁴ More generally, "virtues are those goods by reference to which, whether we like it or not, we define our relationships to those other people with whom we share the kind of purposes and standards which inform practices."¹⁴⁵ Thus, for example,

[w]e hold courage to be a virtue because the care and concern for individuals, communities and causes which is so crucial to so much in practices requires the existence of such a virtue. If someone says that he cares for some individual, community or cause, but is unwilling to risk harm or danger on his, her or its own behalf, he puts in question the genuineness of his care and concern.¹⁴⁶

MacIntyre borrows from the dramatic to explain how situation and relationships are related: in MacIntyre's language, virtues are those qualities which allow us to enact a personal narrative that is part of a larger social story that is also ours, a concept which he calls "narrative selfhood."¹⁴⁷

In the Aristotelian account, virtues are relational and situation-dependent in yet another sense, for they are conceived of as a sort of equilibrium or moderation between the extremes in human character, and their identification is dependent upon where and on what terms they are exercised. As MacIntyre suggests,

Aristotle tries to use the notion of a mean between the more or less to give a general characterization of the virtues: courage lies between rashness and timidity, justice between doing injustice and suffering injustice, liberality between prodigality and meanness. For each virtue therefore there are two corresponding vices. And what it is to fall into a vice cannot be adequately specified independently of circumstances: the very same action which would in one situation be liberality could in another be prodigality and in a third meanness.¹⁴⁸

Again, therefore, the judgment that a person is virtuous is largely dependent upon the practice that the person engages in.¹⁴⁹ Because of this real-

144. *Id.* at 183-84.

145. *Id.* at 191.

146. *Id.* at 192.

147. *Id.* at 216-18.

148. *Id.* at 154.

149. *Id.* at 148, 154.

ity that the exercise of virtues is so situation-dependent, for Aristotle the central virtue is *phronesis*, which "characterizes someone who knows what is due to him . . . who knows how to exercise judgment in particular cases," which is necessary for other such virtues to exist.¹⁵⁰ This account is the basis for my argument that because there are different forms of the virtue that are appropriate to different settings, the forms of even common virtues that make a person a good judge are not necessarily the same "versions" of these same virtues which make a person a good politician.

In any account of virtues true to the human condition, however, it is important to be honest about human limitation, something that virtue ethicists have not always paid attention to.¹⁵¹ First, being honest about human limitation means that we must recognize that real people have distinctive characters. For our purposes, that means that virtuous people are not likely to be virtuous in all respects. Instead, they may exhibit particular virtues in particularly strong ways that allow them to effectively engage in specific practices of our culture. This claim is perhaps the most underemphasized in general accounts of the virtues, which tend to suggest that a good person will be good in all respects. For our purposes, as we identify what virtues judges and politicians need to possess, it must be emphasized that "comprehensive virtue" is not likely to be within the grasp of any single individual. Just as some individuals are by nature excellent musicians or carpenters, and become better with experience and training, so good judges or politicians will tend to be "wired" with some moral and intellectual virtues that can be strengthened with education and experience, and will similarly exhibit some deficits or "vices" that can be ameliorated, but are not likely to be eradicated.

Human limitations do not only implicate the sorts of virtues and vices that one might inherently possess or develop over time as a maturing person. They also influence the ability of persons to change the essential outlines of their virtues and vices as they grow older. MacIntyrean and other accounts of the virtues suggest that it is important that virtues become habitual so that individuals will act virtuously on a routine basis, almost without a second thought. A virtuous person is one for whom the virtues have become so much a part of herself that it would be "out of character" for her to act in a different way; indeed, such a person might experience not just moral but psychological tension if she attempted to act non-virtuously. If this account is correct, it would also suggest that it might be very difficult for individuals who have formed habits of "judicial" character or virtues to re-shape themselves into "virtuous" politicians, particularly if they are middle-aged before they are called upon to learn and exercise political virtues for the first time.¹⁵²

150. *Id.* at 154.

151. See ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* 2-4 (1999).

152. Elizabeth Neff, *Judges Getting Younger as Low Pay Scares Off Older Attorneys, Critics Say*, SALT LAKE TRIB., Dec. 29, 2003, at C1, available at 2003 WL

As MacIntyre has recently pointed out, any honest account of virtues must also account for our human condition as highly dependent and vulnerable creatures. Every individual must have the virtue of acknowledging his personal vulnerability, refusing to claim that as an isolated, rational virtuous actor, he is "objectively" choosing to make a habit of virtue uninfluenced by his surroundings.¹⁵³ MacIntyre names this through the Lakota virtue of *wan-cantognaka*, a virtue of recognizing that one is responsible to one's family and tribe through acts of giving and thanksgiving.¹⁵⁴ As such, in all of the various communities in which we move, we must act responsively, both out of feeling and out of a sense of what the other is due, both as a giver and an acknowledging recipient of the gifts of others.¹⁵⁵

However, because of human complexity, there is a dark side to such relational dependency and reciprocity that must be accounted for as well, what Christians term "temptation." Because even good and strongly autonomous persons live relationally, they will be tempted by others' actions to stray from those virtues, and some temptations will be harder to resist than others.¹⁵⁶ Indeed, the stronger the sense of relationship, of dependency and reciprocity, the stronger the temptation to act unethically will be. More concretely, even a virtuous judge can and will be influenced by the people that surround her and the events of which she is a part; and the more any particular situation such as electoral politics is infected with opportunities for vice, the more decisions for vice we can expect even an otherwise virtuous person to make. To use a graphic example, a virtuous security guard will be tempted to make very different decisions about how to treat prisoners under his command in a Nazi death camp or an Abu Ghraib prison than he might in a white collar federal prison. The public responsibility in any such situation is to order the institution, whether it is politics or judging, in a way that balances a healthy respect for human autonomy and the possibility of good moral choice with the reality of temptation and pressure to make poor moral choices.

It is with these characteristics in mind—virtues as necessary to the good the community seeks, virtues as defined by the particular and varied practices that sustain those community goods, and virtues as practices of human limitation shaped in a crucible of environmental moral demands on the individ-

3701039 (noting that the average age of judges is 54, but that younger people are applying for these positions).

153. See MACINTYRE, *supra* note 151, at x (noting MacIntyre's error in failing to account for the fact of biological or "animal" limitation in providing for a moral account of the virtues, and second, his failure to understand "the nature and extent of human vulnerability and disability").

154. *Id.* at 120-21.

155. *Id.* at 116-17.

156. See MACINTYRE, *supra* note 9, at 219 (noting virtues as sustaining us in doing good as we encounter "harms, dangers, temptations and distractions"). MacIntyre makes the more secular point that virtuous people are less apt to commit grave offenses, but to do a specific wrong is not necessarily to be unvirtuous. *Id.* at 152.

ual—that I turn to the problem of why elections may not be a good way of identifying judicial virtues and why judges, in the main, do not make good electoral politicians. Again, following MacIntyre, my argument is not just that judges might, like all politicians, stray from the proper moral path, but rather that judges' moral virtues do not well match the specific virtues required in electoral politics.

B. Why Elections Cannot Easily Identify Virtues

Following the MacIntyrean argument, we might first ask whether elections are good vehicles to identify virtues in general; and if not, whether it is more important to identify judicial virtues than to determine what judges' platforms would be. If we take MacIntyre's account of the virtues seriously, it would not seem that elections are good vehicles for identifying virtues unless three conditions are met. First, we would want to be convinced that the electorate has reached a clear idea about the goods toward which this social practice of judging (or politicking) aims. Second, the theory depends on the notion that those who select people for their judicial virtues have a full understanding of the practice within which the virtues are exercised. Third, they must be able to clearly identify the nature of those moderating "virtues" that virtuous judicial officeholders are supposed to embody.

The first step in identifying what constitutes judicial (or political) virtues is some public consensus about the good to be achieved by the practice in question. In this case, the good is justice. However, in the case of judging, we might see a curious inversion of MacIntyre's argument that it is likely impossible to identify what practices are necessary to the achievement of a good unless we identify the nature of the good to be achieved.¹⁵⁷ Experience tells me that we could find a higher level of consensus about what the legal system and its substantive and procedural rules require—that is, about the practice that is law—than about what constitutes justice. In a sense, we beg the Aristotelian question, for we trust the practice (the legal system) to achieve the good (justice) absent much dispositive evidence that the practice is an effective means to do so.

One might argue that those experienced lawyers who still participate in the legal system and serve on merit selection commissions have come to believe that the law more often than not achieves justice. Or at least they have concluded that the current practice of judging is the least dangerous choice. While their conclusions may be attacked as self-interested, self-justifying, or just plain self-deluded, at least they have some basis in experience to trust or distrust the system. The average voter, by contrast, has very little experience on which to base a judgment that the practice, as a whole, achieves the good it is "designed" for—justice. Indeed, any one non-lawyer voter's experience is apt to skew his perception—individual litigants will tend to come away

157. See *id.* at 148, 154.

with a strong sense that the system produces more justice than it probably does, or that it is profoundly unjust, no matter how detached they feel themselves to be.

The deeper problem with this difficulty in matching the practice with its telos is the voter's general inability to articulate the *telos* toward which the practice of judging is aimed, a problem which is compounded in a pluralistic democracy. It is, I believe, a safe bet that fewer voters than lawyers will be able to explicate their own views about justice in a sufficiently detailed manner that they can make reasoned judgments about why, to cut to the chase, one judge is more likely to "do justice" than another. The nature of a pluralistic democratic society is that the trajectory between practice and its targeted good will not be linear or arrow-like, as MacIntyre's account of a tradition in *After Virtue* might lead one to assume. Rather, as MacIntyre himself acknowledges, any number of such traditions, from those represented by Aristotle and Augustine to others represented by Islam and Confucianism,

have survived so as to become not only possible, but actual, forms of practical life within the domain of modernity. Even when marginalized by the dominant modern social, cultural, and political order, such traditions have retained the allegiance of the members of a variety of types of community and enterprise, not all of whom are aware of whence their conceptions of justice and practical rationality derive.¹⁵⁸

In any one pluralistic democracy, then, unstated and unrecognized cultural conceptions of justice will be competing for ascendancy.

In my experience, most law students—who I believe are at least no worse off than an average voter in terms of moral reasoning experience and skills—can only with difficulty describe with any complexity the religious and familial sources that inform their views about justice. It is not unfair to speculate that the average voter would have even more difficulty doing so. Indeed, more voters than lawyers are likely to take an intuitive approach to the subject of justice, and therefore be unaware of the plurality of views and traditions on the subject. They may well assume that their own unarticulated community tradition of justice is shared by their fellows, and, as a result, become angry and confused when they discover that their fellow voters make different conclusions about who is the best candidate for political office. On the other extreme, voters who are unaware of their disagreement on such a profound issue as the nature of the tradition in which they are voting may tend to symbolically "expel" from the tradition those who disagree, demonizing them, e.g., calling them "un-American." And, even if voters were fully aware of the fact that they imagine a radically different tradition than their fellow voters, the fact of plurality means that their conception of how a par-

158. See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 391 (1988).

ticular practice like judging fits into a *telos* will more resemble a web of conflicting arrows, each with a different starting point and aiming in a different direction, than a single straight arrow between the practice of virtues and the *telos* of a human life that Aristotle envisioned.

If it is virtually impossible for voters to identify the "justice" toward which the practice of judging is aimed, achieving consensus with other voters about either the good or the practice would seem difficult in an election setting. Of course, I am not suggesting that there is anything wrong with intuitive judgments about justice, or that the existence of contested understandings of justice means that a practice is impossible. MacIntyre suggests that it is precisely in the contest over understandings of the good that a practice is shaped and, if you will, "moves forward." He calls a tradition "an historically extended, socially embodied argument . . . in part about the goods which constitute that tradition."¹⁵⁹ However, the MacIntyrean world of the practice is one that assumes significant paideic attention to a vision of a shared commonweal, a much more republican than democratic understanding of the formation of citizen-activism.¹⁶⁰ That expectation is, perhaps for good reasons, subverted by modern morals education that focuses on autonomy, tolerance, and similar values that tend to undercut a teleological understanding of political community.¹⁶¹

The second condition for a successful identification of "judicial virtues" is to understand the real-live practice of judging. One usual argument for opposing judicial elections is that common citizens are not fully equipped to understand the practice of judging, including an understanding of the legal tradition, the legal system, and the daily practice of judicial decision-making.¹⁶² This claim is both partly wrong and partly right. It is wrong in the sense that increasing numbers of the electorate have more awareness about or connection to the legal and judicial systems, either directly as litigants or indirectly through television shows, family members, and acquaintances. We should not be too quick to overstate voter experience with the judicial system, however, as studies show that these numbers are still low.¹⁶³

159. MACINTYRE, *supra* note 9, at 222.

160. *Id.* at 148, 216; MACINTYRE, *supra* note 151, at 74, 121-22.

161. MACINTYRE, *supra* note 9, at 229 (discussing the turn from a shared good to individual good, and Hume's identification of "artificial virtues" which limit our self-interested desires, such as justice).

162. *See, e.g.,* Maute, *supra* note 14, at 1234 (noting reformers' views that merit systems are better able to weed out bad candidates, objectively evaluate qualifications and identify most qualified persons).

163. *See, e.g.,* Daugherty, *supra* note 22, at 324-25 (noting that two-thirds of judicial voters had not served on a jury, 75 percent had never been a party to litigation, half had never watched a trial, two-thirds did not know any judge, 80 percent could not recall any case they had read about, and two-thirds couldn't recall reading about any judge in the news). Daugherty argues that the lack of familiarity with judicial candidates is evidenced by the fact that Missouri percentages for retention of judges

Yet, in some respects, it would be hard to argue that any particular lawyer's experience of a courtroom is in some way superior to a litigant's experience in understanding what the practice of judging actually looks like. True, some lawyers' repeated exposure to the courtroom might provide them more insight into whether an individual litigant's experience was standard or atypical. However, if each voter exercised the vote according to his own experience with the system and its judges, presumably the sum of those experiences would significantly exceed the experience that any particular lawyer sitting on a judicial merit board could possibly have. Although a cited danger in judicial elections is the paucity of voters who know much about the judicial candidates, it may be that many of those voters who do bother to vote for a judge may have some experiential basis for casting their votes, though they certainly do not report that when they are asked in polls.¹⁶⁴

Indeed, to the extent that we might be concerned about the impact of the justice system on average folks, their collective experience in the legal system would seem on the surface to be a more important bellwether for judging a judge than any collective group of lawyers' experience. An appropriate test of judicial competence takes into consideration whether litigants are afforded full access to tell their stories, fair and impartial treatment, and respect due them as citizens. If these are at least one test of judicial virtue, lawyers who experience the courtroom as (relatively speaking) equals of the judge should have less legitimate experience to rely on than litigants or courtroom staff. At the least, their view of litigants' experiences will be second-hand. No lawyer, for example, can fully experience the humiliation felt by a single mother as she is berated in juvenile court for her child's behavior or conditions in her life over which she experiences little sense of control. Even the most empathetic lawyer cannot fully enter into her experience of the courtroom, much less the experience of the first-time litigant who does not understand what is happening and is not instructed by the judge about what to expect and what his rights as a citizen are.

In the MacIntyrean sense of law as a practice that requires people to understand why lawyers and judges hold on to certain ways of doing things, however, it is probably true that the average citizen's understanding will be necessarily more innocent or superficial than the average lawyer's. And an average voter's understanding will certainly be more limited than the under-

tend to be similar across the board, implying that voters vote based on their overall trust level in the courts rather than their perceptions of individual judges. *Id.* at 323-24.

164. See, e.g., *id.* at 327 (noting that a survey of voters in a 1992 Missouri election disclosed that their primary information came from the media, personal experiences, or conversations with others). See also JUSTICE IN JEOPARDY, *supra* note 8, at 36 (noting that only about 20 percent of the electorate votes for judges, and as many as 80% percent do not know what candidates are on the ballot). The report also notes many voters respond to lack of knowledge by only voting for those high offices at the top of the ballot and neglecting to vote for judicial offices. *Id.*

standing of the kind of seasoned lawyer who is usually selected to serve on a judicial merit commission. In an article about why laypeople are not as competent as lawyers to be appellate judges, Larry Solum suggests that the problem with laypeople is that they do not tend to possess three virtues that lawyers, by virtue of their legal training, do tend to possess.¹⁶⁵ First, they do not know the law—to use his term, they do not have the intellectual virtue of judicial intelligence necessary for understanding the limits of judging, for applying the law to particular fact situations, or for integrating legal and non-legal arguments into an opinion that fits within the confines of doctrine and remedy as it stands.¹⁶⁶ Second, they do not have the experience of applying the law repeatedly to particular fact situations, experience that is necessary in order to inculcate the habit of legal *phronesis*, or practical wisdom.¹⁶⁷ A third virtue Solum proposes, to which I will later return, is what he describes as judicial integrity.¹⁶⁸

The problem with non-lawyers choosing judges goes at least slightly deeper than their deficits in the intellectual virtues of judicial intelligence and judicial *phronesis* in the narrow sense of those terms. We might take popular discussion of the rules against hearsay and the exclusionary rule as examples. Most laypeople, when they come across such rules in a particular case, regard the rules as foolish at best, and perverse at worse, in that they allow criminals and other wrongdoers to be judged on the basis of incomplete information.¹⁶⁹ They might be able to learn, relatively quickly, the outlines of the hearsay rule and the exclusionary rule and grasp an abstract explanation for why the rules are necessary, if they cared to do so in order to make an intelligent voting decision. Yet, what even the most serious lay voters will not possess that every new law school graduate has is an insight into the actual experience of the litigants from whose lives these rules have been shaped. It is no accident that law school students read cases: without understanding how legal rules (or the lack of them) affect real people's lives, it is difficult to imagine how anyone could reach a sensible conclusion about whether, on balance, a rule like the exclusionary rule is more likely to remedy injustice or to cause it. If the exclusionary rule were posed as an abstract "thought experiment" to law students, as it would necessarily be to a voter, law students would be no more likely to embrace it than the average voter. We might surmise that lawyers

165. See Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1737-38 (1988).

166. *Id.* at 1740, 1746-49.

167. *Id.* at 1752-54.

168. *Id.* at 1752.

169. Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 756 (1998); Thomas Weigend, *Is The Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 165-66 (2003).

can embrace such a rule partly because they have heard the story of Danny Escobedo or Ernest Miranda.¹⁷⁰

This is not to say that standard law casebooks are above reproach in their treatment of the lives represented in the pages of legal opinions. In addition to the standard criticism that individual appellate opinions "bleach out" much of the human element from the real controversies,¹⁷¹ the fact is that most law students do not read nearly enough cases about the exclusionary rule or the hearsay rule to make a fully informed judgment about how real people are actually affected by the law, with and without these rules. Even so, at a minimum, law students will have had to confront at least several lives affected by these rules (or their absence) and will have a somewhat more profound and less abstract sense of what is at stake for real people. Seasoned lawyers who participate in judicial selection and run as candidates will have even more human encounters to help them see the value (or disutility) of such rules. Thus, there is a vast gulf between what even a motivated layperson can

170. *Escobedo v. Illinois*, 378 U.S. 478, 479-83 (1964). In *Miranda v. Arizona*, 384 U.S. 436 (1966), a seminal case read by most law students in the standard Criminal Procedure course, the story of the Escobedo case is recited as follows:

[In *Escobedo*], as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said 'I didn't shoot Manuel, you did it,' they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him.

Id. at 440. The *Miranda* case also goes into extensive detail into deceitful, manipulative and abusive tactics police are instructed to use in training manuals to secure confessions from suspects, *id.* at 449-54, as well as reciting other stories designed to evoke students' and others' sense of injustice about police tactics, e.g., stories in which "defendant was a 19-year-old heroin addict, described as a 'near mental defective,'" "a woman who confessed to the arresting officer after being importuned to 'cooperate' in order to prevent her children from being taken by relief authorities," and a defendant "whose persistent request during his interrogation was to phone his wife or attorney," *id.* at 456 (citations omitted).

171. See M. Cathleen Kaveny, *Listening for the Future in the Voices of the Past: John T. Noonan, Jr. on Love and Power in Human History*, 11 J.L. & RELIGION 203, 211 (1994-95) (describing Judge Noonan's critique of the masks of the law that disavow the humanity of persons); see also Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 584 (2000) (using the term "bleach[ing] out" to describe how lawyers exclude personal idiosyncrasies about themselves to put on the image of an impartial professional).

learn about the law and what a lawyer knows, somewhat like the difference between learning only the maxims of Aesop's fables and learning the narratives that precede them.

If voters cannot have any deep historical perspective into the stories that craft law as a practice into a particular form, it is difficult to see how they could come to judge the characteristics of that practice—for example, a prosecutor's election claim that he will vigorously oppose any extension of the exclusionary rule. Moreover, it is difficult to discern how even an informed lay voter would be able to identify the virtues necessary to such a practice which is so inherently complex that the trend is increasingly toward practice specialization for lawyers (i.e., learning a "sub-practice" in MacIntyre's term). The reality of the complexity of the practice of judging, as I have suggested, does not militate exclusively in favor of a lawyer-led merit selection system. It simply suggests that the lay electorate may be better at detecting some virtues of judges, and that experienced legal professionals may be better at detecting others.

A third requirement in determining who would make the best judge from a virtue perspective is the ability to identify those who possess traits of character, formed by habits, that enable a practitioner to judge excellently on a consistent basis, or at least to identify those chasms of vice that lie on either side of the summit of a particular virtue.¹⁷² In the MacIntyrean account, the virtuous judge will exercise her virtues out of habit, will usually be able to do good intuitively, and will be more easily able to overcome those temptations to do wrong that come her way.¹⁷³ The MacIntyrean account also assumes that occasionally a virtuous judge will fail (albeit rarely) to exercise virtue, so that our judgment of her virtue should be based on the course of a life and not solely on some aberrant moment.¹⁷⁴

However, it is very difficult to imagine how, in a typical democratic setting, the electorate is supposed to figure out whether a particular candidate has virtuous habits of character. For one thing, even if voters have the ability to accurately criticize candidate virtues and vices, the information available for that task will be limited and unevenly distributed. Even lawyers who see a judge more often than laypeople will witness a different side of a judge than court personnel or law enforcement officials. Whether a judge acts virtuously and consistently toward all of the individuals with which she interacts may be

172. See ANDRÉ COMTE-SPONVILLE, *A SMALL TREATISE ON THE GREAT VIRTUES: THE USES OF PHILOSOPHY IN EVERYDAY LIFE* 39 (Catherine Temerson trans., 1996).

173. See, e.g., PHILIPPA FOOT, *VIRTUES AND VICES* 8 (2002) (noting that the virtues are a corrective, "each one standing at a point at which there is some temptation to be resisted or deficiency of motivation to be made good").

174. See MACINTYRE, *supra* note 9, at 152 (noting that a brave and modest man may occasionally commit murder, but to do wrong is "not the same as to be defective in doing or being good").

difficult for most people to ferret out.¹⁷⁵ In a small town, voters will know the general virtues and vices of candidates because they will have encountered them in other settings, such as church, nonprofit organizations from Boy Scouts to charities, or even bowling on a Saturday night. Even in these cases, however, there is no guarantee that these voters will have any experience to draw on about a potential candidate's *judicial* virtues. They will still have to translate analogous virtues they experience when a candidate acts as parent, volunteer, or lawyer, to the task of judging. Indeed, judicial character might be particularly hard to ferret out from a lawyer's professional activities because values such as confidentiality and circumspection may hide much of a lawyer's work from the general public.

Moreover, because electoral information is necessarily so media-driven, the focus of electoral information is singularly on the most extreme negative events and not on lawyers' histories, so that single episodes can easily overtake routine habits of character as the test of whether a judge is suitable. We might all agree that even one instance of bribe-taking should be enough to disqualify a candidate for judicial office, even though, as Judge Noonan points out, even so profligate a bribe-taker as Sir Francis Bacon possibly had other judicial virtues to commend him.¹⁷⁶ However, it is not clear that one judicial outburst in court at a particularly trying litigant, or one moment of judicial disrespect of a vulnerable defendant, is sufficient evidence of a judicial candidate's character—as the saying goes, we all have a bad day, and judges are no exception. Yet, these individual instances are the stories that circulate among lawyers, judges' staffs, and ultimately the public, not the ninety-nine other cases in a hundred in which a particular judge exercised patience and respect for the litigants before her. Whereas lawyers may have sufficient experience with the judge in many other cases to distinguish between a character defect and a "bad day," voters may never have any basis for making such a distinction. During elections, the media does not generally report either run-of-the-mill "good news" events like the ninety-nine cases, or even any evaluative consensus, like "most lawyers think Judge X is respectful

175. In a Missouri-style system, it is at least conceivably possible for a very interested and informed voter to determine this: he might be able to either experience for himself, or to take account of others' summaries, of the ways in which sitting judges habitually did or did not exercise some particular virtue or vice required of a judge. But in an electoral system in which any lawyer can run, the only candidates about which any particular voter is likely to have enough information about their habits are those candidates who have held some other publicly visible office, as prosecutors, legislators, or on visible government boards.

176. See John T. Noonan, Jr., *Education, Intelligence, and Character in Judges*, 71 MINN. L. REV. 1119, 1128-29 (1987) (describing Bacon's failure to exhibit the virtue of justice).

to litigants.”¹⁷⁷ And, we can certainly not count on judicial opponents to distinguish fairly between an aberrant episode of unjudicial behavior and a trait of character suggesting that a sitting judge is not virtuous.

Finally, in any account of judicial and political virtues, we must reckon with the temptations caused by human relationality and the limitations of personal self-awareness. If I am correct that virtuous individuals are strongly shaped by reaction to their surroundings, we might want to ask whether the surroundings of a judicial campaign reinforce judicial virtues or damage them. The current advice given to judges running for office is to form campaign committees and seek campaign consultants.¹⁷⁸ If, however, the judge is facing continuous pressure from those committees, consultants, and family members to do whatever it takes to win, along with pressures from opponents that might bring out self-defensive instincts and pressures from financial contributors to align the candidates' views with their own, even the most virtuous judge may be tempted to depart from previous “virtuous” conduct in order to win. These departures may signal a long-term change in a judge's moral habits as well, if the judge comes to believe he must continue to behave unvirtuously in order to stay in office.

The reality of human interdependence can, of course, be tempered with a strong dose of self-criticism. Yet many, if not most, human beings have a very difficult time being objectively critical of their own strengths and weaknesses, virtues and vices. The rush of a campaign, the multiplicity of skills that lawyers usually possess, and their common experience that their ambitions are within their grasp can easily reinforce candidates' self-delusions that they can be effective and virtuous campaigners as well as good judges. Conversely, potentially good judicial candidates who are truly self-critical may shy away from elections because they realize that they do not have the best skills for the job of politicking, even if they accurately assess their judicial abilities. Justice Phillips, among others, has remarked about the large number of highly qualified people who present themselves for appointment to the federal bench in Texas but never run for state court offices.¹⁷⁹ Presumably,

177. See, e.g., Joseph R. Cerrell & Hal Cash, *Issues in Judicial Election Campaigns*, in *STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES* 39 (Roger Clegg & James D. Miller eds., 1996).

178. *Id.* at 48 (noting that candidates in outlying areas or without opponents will not be reported on by the press).

179. See Phillips, *supra* note 21, at 143 (noting that dozens of qualified lawyers offer to serve on the federal bench, while open seats on the state bench “seldom draw a crowd,” even open supreme court seats in 1993 drew only six candidates to fill two seats of retiring justices); see also Krivosha, *supra* note 26, at 132 (noting that free senior partners of large firms are generally not willing to sacrifice a year of campaigning, or to cause alarm among their clients by seeking office); Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, J. KAN. BAR ASS'N, Jan. 2000, at 32 (noting that campaigning takes candidates away from their practice, where

some of them recognize that they don't have the gift for politics even if they have the gift for judging. One conclusion we might draw from this paradox is that voters should be suspicious of any judicial candidate who thinks he is also the best electoral candidate. However, such reasoning doesn't elect a judge.

*C. Why We Might Want to Know More About the Virtues of Judges
Than About Their Platforms*

We might give up this argument and admit that elections are not good vehicles for determining character, at least of judges. Instead, we might argue that judicial elections are just like other elections, and it is more important that we know judges' positions or "platforms" than that we know their character. Although too much can be made of the distinction between judicial and other offices, I would contend that such a turn would be misplaced. First, many, if not most, judges are embedded in their communities in a way that politicians may not be, particularly politicians for higher office. As lawyers who have generally had lengthy experience in local communities where they become judges, judicial candidates have been embedded in the *ethos* and practice of those communities, and are sought as judicial candidates precisely because they have developed a historical bond with those communities. Moreover, judges even more than politicians are likely to be "lifers"¹⁸⁰—they are likely to be judging in the community long after Politician X or the latest political hot-button, whether it's the war in Iraq or a local abortion clinic protest, has come and gone.

As trusted lifelong participants in the community, rather than temporary leaders, judges may be more adequately evaluated on their habits of character, which are more likely to shape their reactions to long-term shifts in political and legal winds, than on any particular position they hold about a current issue. Perhaps the most common reason given for eschewing judicial elections is that we do not want judges feeling forced to decide cases in a particular way. We want them to retain a sense of integrity. For Solum, the virtue of judicial integrity is a three-fold moral ability: the ability to choose to suppress one's personal political or moral preferences and make a decision on the basis of the law; to treat like cases alike; and to apply the law consistently, so that

the costs of participation are high and results uncertain); Maute, *supra* note 14, at 1205.

180. Compare Stephen G. Bronars & John R. Lott, Jr, *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things that They Do?*, 40 J.L. & ECON. 317, 321 n.8 (1997) (noting tenure of sampled Congressmen from 1977-90 was approximately 12½ years) with Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945-2000*, 91 CAL. L. REV. 1029, 1047 (2003) (noting that federal judges currently serve an average of over twenty years).

justifications for particular decisions constitute "a seamless web."¹⁸¹ We might more singly define judicial integrity in the more common ethical sense of the word, the self-respect from knowing that one has acted consistently over time.¹⁸² Similarly, since judging is a community practice, judicial integrity means having a healthy respect for a community's traditions. For a judge to act with integrity means that her actions and decisions over time will consistently reflect a personal pattern of honor as well as the community's tradition of justice.

At the same time, focusing on judicial integrity rather than judicial platforms underscores two ways in which judges necessarily "buck" the immediate sentiments of the community in a particular election. Advocates of unfettered judicial candidate speech seem to posit that a good judge is one who does not hide his past commitments by pretending, for the sake of impartiality, that he does not have any such commitments.¹⁸³ They consider it dissembling for a pro-choice judicial candidate, for example, to suggest that he should not give his views on abortion bypass cases in a campaign.¹⁸⁴ What they do not take into consideration is that a good judge must be sufficiently in tune with his community to intuitively adapt as the community changes, something that a firm commitment on the eve of his election will make it difficult for a person of integrity to do. Indeed, we should want judges to change their minds as conditions in a community change, if they are going to reflect the community's intuitive sense of justice that gives judicial decisions their imprimatur of authority.

This notion that it is a good thing for judges to be able to change their minds, not only when they are confronted with the facts of a specific case but as they reflect on the mores and assumptions of their local communities, is largely behind the "announce clause" concern. That concern suggests that judicial candidates who "announce" may find themselves bound to positions that they will disagree with once they assume judicial office and understand

181. See *Solum*, *supra* note 165, at 1751-52.

182. See, e.g., *MACINTYRE*, *supra* note 9, 217-19 (discussing integrity as related to a narrative unity of a human life).

183. See, e.g., *Miss. Comm'n on Jud. Performance v. Wilkerson*, 876 So. 2d 1006, 1015-16 (Miss. 2004) (noting that, while having impartial judges is a compelling interest, there is "no compelling state interest in requiring a partial judge to keep quiet about his prejudice so that he or she will appear impartial." The Court colorfully notes, "There is an old Malayan proverb which states: 'Don't think there are no crocodiles because the water is calm.' . . . [The] Commission urges us to 'calm the waters' when, as guardians of this state's judicial system, we should be helping our citizens to spot the crocodiles.").

184. See *Nelson*, *supra* note 11, at 1634 (noting that "words don't make a partisan judge, a partisan judge makes a partisan judge. The bottom line is that a false appearance with no underlying truth can only harm the judiciary and the voters.").

the real "lay of the land" of their work.¹⁸⁵ Free speech proponents understandably retort that any judge worth his salt will not be so prideful as to refuse to change his opinion when necessities of a case dictate, simply because he has "announced" as a candidate.¹⁸⁶ Yet, if we really wanted to know whether a judge has the common sense to change his mind when either the case or the needs of the community dictate, taking the measure of a judicial candidate's character habits over time is probably a better means of figuring that out than asking his position about some issue during the few months of the electoral cycle.

Second, the traditional focus on judicial integrity is designed to remind the public that sometimes judges, more than other political figures, are required to hold up a mirror to the community and ask it to confront its worst behavior measured against its highest aspirations.¹⁸⁷ It is no accident that Atticus Finch is both a popular hero and a paragon for law students and lawyers.¹⁸⁸ Among his virtues is the willingness to confront his community with the disparity between their professed values of community, gentility, and fairness and their actual practice of scapegoating an innocent man for racial sins they cannot bear to face. Similarly, by judicial integrity, we often mean that judges should decide cases according to the laws or constitution that the voters have adopted in their best moments, rather than bowing to the worst instincts of fear and hatred that they exhibit in the wake of a murder or other community tragedy. It is difficult to imagine how a "platform" of judicial integrity, conceived in this way, could be constructed.

Finally, political leaders, unlike judicial candidates, are selected for the purpose of directing government toward particular ends.¹⁸⁹ We choose a president so that he will turn around the economy or pass legislation on a particular moral issue or engage in a certain style of foreign relations. We grant these political leaders the authority to engage in steps to accomplish

185. This is a somewhat different concern than that expressed by Justice Ginsburg, who worried that litigants would pressure a candidate to renounce her campaign pledges. *Republican Party of Minn. v. White*, 536 U.S. 763, 816 (2002) (Ginsburg, J., dissenting).

186. Justice Scalia, for example, argued that judges will not feel any great compulsion to be consistent with nonpromissory statements in a campaign. *Id.* at 780-81.

187. See *id.* at 798 (O'Connor, J., concurring) (arguing that "in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity," and noting that "countless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least 50 percent of the litigants who appear before them"); Maute, *supra* note 14, at 1211-12 (noting that judges need independence when they are confronted with community passion or prejudice).

188. Note, *Being Atticus Finch: The Professional Role of Empathy in To Kill a Mockingbird*, 117 HARV. L. REV. 1682, 1688 (2004).

189. See *White*, 536 U.S. at 805-06 (Ginsburg, J., dissenting) (noting that the primary function of legislative officers is to advance the interests of constituents).

those ends, including hierarchical authority over a legion of government officials who have to take the actions necessary to accomplish these goals.

By contrast, the democratic system we have chosen does not direct judges' actions toward particular ends: as a collective, voters do not select judges so that they will join forces to get rid of the PATRIOT Act or partial-birth abortion, in the same way that they might elect legislators to do. If the purpose of a governmental branch is to achieve particular ends, voters will want to be well-informed about how a politician defines those ends (to ensure that they are in agreement) and how skillfully that politician can form vehicles and harness resources to achieve those ends. A platform is a necessity in such an assessment.

By contrast, if a judge is expected to do justice in the particular case, it is hard to imagine what kind of general platform about ends and means she could offer that could explain how justice in the particular could be done. Of course, as judges are also administrators, there are some limited forms of "platform" that might be useful for voters to know. For example, voters might wish to know what steps a judge is going to take to streamline the courtroom process so that cases can be heard more efficiently, or what a judge is going to do about the rise in non-English-speaking litigants in the courtroom. But, by and large, these sorts of "platforms" geared to issues on which a judge exercises traditional ends-seeking leadership are currently not prohibited by the rules.¹⁹⁰

IV. WHY VIRTUOUS JUDGES MAKE POOR ELECTORAL CANDIDATES

Beyond this general account of the virtues and the difficulty of identifying them in elections, my thesis is that virtuous judges do not make good electoral candidates, because they do not—and should not—possess the virtues of an electoral candidate. Rather than providing a complete catalogue of the virtues of a good judge, I intend to focus on those virtues that are particularly unsuitable in the electoral arena. First, I will argue that elections are a poor venue in which to test virtues somewhat unique to judging: the judicial virtue of impartiality, as variously described by Justices Scalia, O'Connor, Kennedy, and Ginsburg in *Republican Party of Minnesota v. White*;¹⁹¹ the virtue of judicial reflectiveness; and the virtue of judicial carefulness. In the next Section, I will also argue that common virtues like fidelity, humility, and honesty take on a particular hue in the practice of judging that makes them unlikely candidates to be identified in electoral politics.

190. For example, Canon 5 does not prohibit judges from talking about their views on court administration. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 5 commentary (1990) (amended 2003); Cafferata, *supra* note 11, at 1644-45.

191. *White*, 536 U.S. at 775-83 (majority opinion written by Scalia), 789-92 (O'Connor, J., concurring), 797-803 (Stevens, J., dissenting), 803-21 (Ginsburg, J., dissenting).

A. The Virtue(s) of Impartiality and Judicial Elections

In *Republican Party of Minnesota v. White*, Justice Scalia, writing for the majority, spends considerable space attempting to define the virtue of "impartiality," which was the state's proffered compelling interest for its "announce" restriction on judicial candidates.¹⁹² In Justice Scalia's view, the virtue of impartiality could mean one of three things: "lack of bias for or against either party to the proceeding"; or "lack of preconception in favor of or against a particular legal view"; or open-mindedness, the willingness "to consider views that oppose [the judge's] preconceptions, and remain open to persuasion, when the issues arise in a pending case."¹⁹³ By contrast, the concurring and dissenting opinions focus on broader definitions of impartiality that go to the heart of the concerns with judicial elections that I previously described: *quid pro quo* conflicts and judicial punishment for non-support, the creation of "soft" obligations on behalf of litigants and lawyers, and the public appearance of impropriety. Initially, Justice Ginsburg and Stevens are particularly concerned about the first two problems, which might be defined as the problem of judges acting in self-interested ways in elections,¹⁹⁴ while Justice O'Connor's primary focus is on judges who act out of a sense of beholdenness to those who helped them get elected.¹⁹⁵ However, all three of these opinions also focus on the related virtue of judicial independence—the ability of a judge to decide matters according to the law rather than on the basis of popular pressure.¹⁹⁶

Justice Scalia is so quick to dismiss concerns about self-interestedness and beholdenness that animate both the literature and the cases on judicial selection that one might wonder if he is living within the same practice of judging described in the voluminous work on this issue.¹⁹⁷ To borrow from

192. *Id.* at 775-80.

193. *Id.* at 775, 777-78.

194. *See, e.g., id.* at 799-800 (Stevens, J., dissenting) and 814-19 (Ginsburg, J., dissenting).

195. *See, e.g., id.* at 790 (O'Connor, J., concurring). *But see id.* at 817-18 (Ginsburg, J., dissenting) (focusing on the appearance of impropriety, or in Ginsburg's words, the public perception of judicial integrity).

196. *See, e.g., id.* at 791 (O'Connor, J., concurring), 797-99 (Stevens, J., dissenting), 817 (Ginsburg, J., dissenting).

197. Justice Scalia treats the concerns about self-interestedness very briefly, arguing variously that virtually all judicial candidates, even federal bench appointees, make statements seeking to enhance their chances for office and thus would be ruled unfit by Justice Stevens, *id.* at 781 n.8; and that all sitting judges who face election have a "direct, personal, substantial, and pecuniary interest" in their jobs which is potentially influenced by every single ruling that they make, *id.* at 782. He indirectly answers Justice O'Connor's concern about beholdenness by suggesting that the Canons' "pledges or promises" clause is much more closely geared to avoiding the problem of judges feeling obliged to carry through with their commitments than the "announce" clause. *Id.* at 780-81.

the MacIntyrean historical conceit, it is as if Justice Scalia has made his peace with living in the judicial world of Sparta while the other Justices are hoping for something more resembling Athens.¹⁹⁸

Yet, playing Justice Scalia's dictionary game for a moment,¹⁹⁹ it is easy to see why his notion of impartiality as a lack of bias for or against a party is too small to encompass the concerns that have brought states to care about the impartiality of judges, and is, indeed, somewhat misleading. Justice Scalia's first argument, that announcing one's views about a contested legal issue is not usually a demonstration of bias about particular parties before the court,²⁰⁰ seems credible at first blush. Lack of bias or (according to the dictionary) of "personal and sometimes unreasoned judgment"²⁰¹ has traditionally been expressed as part of the judge's repertoire of virtues in the two ways suggested by the definition. First, judges should not make "personal" judgments, that is, they should decide cases based on the facts and the law²⁰² and not based on their own views of the litigants.²⁰³ Second, as the dictionary suggests, and as I will touch on later, impartiality can imply that judges should make judgments based on "reason" instead of "emotion."

While the distinction between personal and "fact-based" judgment has a certain ring of authenticity to it, it can be somewhat disingenuous if taken to

198. In the *Politics* Book II, chapter 9, Aristotle criticizes the Spartan ephors or public judges, who are chosen from among the people. He argues that this method of selection results in decisionmakers who have little wealth, making them open to bribery, and causing them to act dictatorially in the exercise of their powers. Moreover, the ephors live a life of ease. However, he notes, the people like it because it gives them a share in an office of power. Yet, he argues that because the ephors can be chosen from among the people, e.g. considering that anybody at all may hold the office, they should not be given judicial discretion but only the power to decide according to stated rules and regulations. See ARISTOTLE, *POLITICS* Book II, ch. 9, available at <http://classics.mit.edu/Aristotle/politics.2.two.html> (last visited Apr. 24, 2005).

199. See Merriam-Webster Online, at <http://www.m-w.com/> (last visited Apr. 24, 2005) (noting the definition of "impartial" as "not partial or biased: treating or affecting all equally," "fair," "marked by impartiality and honesty: free from self-interest, prejudice, or favoritism"); see also definition for "bias:" "bent, tendency" "an inclination of temperament or outlook; especially: a personal and sometimes unreasoned judgment: prejudice." *Id.*

200. *White*, 536 U.S. at 775-77. Justice Scalia does seem to concede Justice Stevens' point that sometimes judicial speech will exhibit a bias against parties, e.g., when an election speech suggests an "unbroken record of affirming convictions for rape," suggesting a bias for the prosecution and against the class of rape defendants. Compare *id.* at 800-01 (Stevens, J., dissenting) with *id.* at 777 n.7 (conceding that the "announce clause is barely tailored" to serve the interest against bias because of this possibility).

201. See Merriam-Webster Online, *supra* note 199.

202. *White*, 535 U.S. at 775-76 (Justice Scalia suggests that in this sense, impartiality is a species of equality doctrine).

203. See *Solum*, *supra* note 165.

its logical extreme. First, we might take the notion that judges should decide based on "facts" and "law," and not on the "person" of the litigant based on the judge's "personal" evaluation of her. Should a judge discount the person of the litigants in making his decision, in many cases he would have to discount a critical part of the facts. For example, where the facts are contested and the evidence evenly weighted (e.g., there are only two opposing eyewitnesses and no circumstantial evidence to support either witness's version of the facts), the only basis on which a judge can make a decision about what version is more likely to be true is to weigh the apparent character of the witnesses. This process indeed requires a "personal" judgment, a judgment about the person of the witnesses. As another example, only an incompetent judge—or perhaps one bound by sentencing guidelines—would fail to consider the "person" of the defendant in making a decision on his punishment, whether she was a retributivist or an advocate of deterrence, incapacitation, or rehabilitation. All of these theories require an evaluation or prediction about human nature in general and about the defendant in particular.²⁰⁴ And it would be difficult to imagine how a judge could grant custody of a small child to one parent or another without considering the "person" of the parties.

The maxim about deciding the cases based on the facts and the law, rather than on the person of the litigants, must ultimately mean that character must play a role, but *only* a (usually) minor role, in the judge's decision. A three-time criminal cannot be convicted of a fourth crime without evidence that he actually committed it, whatever his character. A mother who does not meet the judge's personal views on motherhood nevertheless must be able to keep her child unless the judge can justifiably find that she actually acted in ways that meet the legal standard for neglect or abuse.

Yet, it is difficult to see how a traditional election contest can test the nuanced *phronesis* that is necessary to decide when and to what extent it is proper to consider the litigants "as persons" and when a judge should focus only on the other "facts" of their case and the law. One could hardly even imagine a news story in an election cycle that tried to capture a candidate's judicial *phronesis*, or the lack thereof, on paper, much less explained to voters how Candidate A demonstrated that *phronesis* through years of judging, while Candidate B did not.

However, neither Justice Scalia's focus on impartiality in the bias sense nor impartiality in the rationality sense was apparently the kind of "bias" that the Minnesota Supreme Court was worried about in promulgating its rule

204. One possible exception is pure assaultive retribution theory. In some accounts, this theory is premised on the notion that all acts of a particular genre, such as murders, have a precise punishment which is "due" them irrespective of circumstances or the character of the actor. See JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 39-40 (2d ed. 1999) (excerpting 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 80-82 (1883) (noting that punishment properly gives expression to social hatred)).

about "impartiality."²⁰⁵ The dictionary defines impartiality also as fairness, i.e., "free from self-interest, prejudice or favoritism."²⁰⁶ Setting aside the question of prejudice for a moment, we must consider what judicial virtue is suggested by the concept of being free from "self-interest . . . or favoritism." The judicial election canons and the other opinions in *White* really identify two concerns that militate against finding "impartial" judges: the problem of self-interestedness and the problem of beholdenness.²⁰⁷

In common parlance, and in Justice Scalia's view,²⁰⁸ to discuss self-interest is to describe a fact of life: true altruism, the ability to consider everyone's interests excluding one's own in making a moral judgment,²⁰⁹ while often praised, has been honored more often in the breach. To be sure, we might not wish to ground any theory of judicial ethics on the extreme opposite moral theory, ethical egoism, which suggests that because we *do* consider our own self-interest in real life, it is wrong to consider anyone's interests but our own in making a moral decision.²¹⁰ But most standard ethical theories such as ethical universalism or utilitarianism do not require moral persons to exclude their own interests from moral consideration; they only require that the moral actor not count himself as excessively more important than others whose actions he might affect.²¹¹

In the case of judges, however, "self-interest" takes on a particular meaning which is described more specifically in both judicial and lawyer canons: the judge should not use the power of her office to secure tangible benefits, such as money and property, for herself or her immediate family or close friends.²¹² Indeed, she should not place herself in a situation where she would have to choose between her own tangible interests and the interests of a person who comes before her.²¹³

205. See, e.g., *Republican Party of Minn. v. Kelly*, 247 F2d 854, 864 (8th Cir. 1991), *rev'd*, 536 U.S. 765 (2002) (discussing state interest in applying the law neutrally rather than on the basis of any implied or express commitments or prejudices).

206. See *supra* note 200.

207. See Zeidman, *supra* note 34, at 819-20 (noting that judges may become beholden to those who contribute to their campaign); *supra* notes 193-96 and accompanying text (on *White* opinions).

208. See *Republican Party of Minn. v. White*, 536 U.S. 765, 781 n.8 (2002) (implying that every federal judge makes statements "with the hope of enhancing" his chances of confirmation).

209. See TOM L. BEAUCHAMP, *PHILOSOPHICAL ETHICS: AN INTRODUCTION TO MORAL PHILOSOPHY* 42-45 (3d ed. 2001).

210. *Id.* at 48.

211. *Id.* at 49.

212. SHAMAN ET AL., *supra* note 64, at 137-43 (discussing requirements of disqualification when a judge or family member has an interest to be benefited in a case).

213. See *White*, 536 U.S. at 816 (Ginsberg, J., dissenting) (discussing psychological egoism's challenge to altruism).

However, the seeming vice of self-interestedness, or if you will, the virtue of disinterestedness, takes on particular meaning during elections, whether judicial or not. As the Supreme Court at least implies, communities have a plentitude of interests in stemming direct corruption—e.g., the act of a candidate who takes some benefit such as money or property in exchange for a vote or other use of public power to secure the financier's private advantage.²¹⁴ What would in private business in a capitalist economy be considered virtuous²¹⁵ becomes a problem in government employment. For one thing, practiced self-interest by public officials undercuts the notion of the political equality of citizens. In democratic theory, citizens gain personal advantage in the public sphere by political participation (voting, political advocacy, supporting candidates, etc.) rather than by purchasing public advantage. Moreover, corruption has the potential to harm the notion of democratic government as visible government—if people can use their resources to secure back-door advantages, citizens will not know the real reasons that laws were passed, and will have little real way to influence the process.

But some judicial election codes have taken a radical, and I believe exemplary, path to eliminate the crudest forms of self-interested dealing, i.e., the *quid pro quo* corruption that is problematic for all elected officials. In many states employing the Model Rules of Judicial Conduct, fundraising for judicial campaigns must be conducted by a separate committee that cannot include the judge or members of his family.²¹⁶ In some states, such as Minnesota, that committee must erect a fundraising "screen": judges are not permitted to know who gave money to their election campaigns or other causes that the judge champions or directs, or how much any individual or organization gave.²¹⁷

Screens not only deter people with money from trying to bribe or indirectly purchase the votes of candidates; they also reduce the temptation for candidates and staffers to offer a *quid pro quo*, indirectly or directly, to the

214. *Id.* at 776 (noting the need for impartiality by citing to bribery cases).

215. Capitalism assumes that it is a good for people to offer their resources in a bargain exchange which is more optimal for themselves as well as others. In a pure market system, then, a judge should be permitted to offer his power to make judgments in exchange for consideration to the highest bidder. See Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1981-82 (1988) (noting a Texas professor's argument that using resources to elect judges favorable to each position is the same as doing so for legislators).

216. See ABA MODEL RULES OF JUDICIAL CONDUCT Canon 5B(2) (1990) (amended 2003); MINNESOTA CODE OF JUDICIAL ETHICS Canon 5B(2) (2004).

217. See MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5B(2) ("Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation.").

wealthy or special interest groups to obtain needed campaign funds.²¹⁸ If the field of givers were reduced to those who care only about the general positions on which a candidate runs, not only would election campaigns be less expensive, but candidates would be required to appeal to the interests of a broader spectrum of the population in order to get the funds to be elected.

Current challenges to judicial election codes, claiming that non-solicitation rules violate the First Amendment, attempt to wipe out the benefits of separate fundraising committees.²¹⁹ If they are successful, we are back to the specter of direct corruption and the appearance of corruption that so concerns commentators on judicial elections.²²⁰

Moreover, the problem of self-interestedness takes on a particularly dark hue in judicial elections. A legislative candidate may not be permitted to work in her own self-interest in the narrow, "corruption" sense of the word; but it can hardly be said that she is not pursuing her self-interest in the larger sense. Apart from the fact that politics gives one access to power, prestige, and a job, legislative office-holders by and large pursue political and ideological interests which are "self-interests" though not exclusively so. This is true whether they run for office because of some specific agenda based on their own past experience, or whether they are motivated to improve the community in which they live. The democratic system suggests that those "self-interests" which prevail will be those shared by a majority of voters, even though we might expect a virtuous lawmaker to hear out those who do not share such interests before she votes on a bill.

While in the broadest sense of the word judicial candidates also seek office to improve communities of which they are a part, things become more complicated when they purport to represent the interests of themselves and some limited segment of their communities, such as by pronouncing that they are "pro-life" candidates or support the death penalty wherever possible.

218. Indeed, were judicial financing screens realistic in traditional legislative and executive campaigns—and there is good reason to believe they would not be when the economic and political stakes for telling candidates where their money comes from are so high—such prophylactic measures would be a better cure for the appearance as well as the reality of political corruption than existing campaign finance laws. However, screens were not adopted by the 1990 Model Code of Judicial Conduct because of jurisdictions' requirements that candidates disclose their contributor list, and because screens would make it difficult for judges to recuse themselves in particular cases. See Maura Anne Shoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 852 (1994).

219. See, e.g., *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 145-46 (3d Cir. 1991) (holding that judicial election rules which allow judges to participate in many aspects of fundraising except directly soliciting gifts themselves are not unconstitutional); *In re Fadeley*, 802 P.2d 31, 40-41 (Or. 1990) (per curiam) (holding that prohibition against direct solicitation by judges does not violate First Amendment right to free expression).

220. See *supra* notes 213-215 and accompanying text.

Even beyond the power to recall legislators through election and other means, citizens who do not share the "self-interest" of particular legislators will have resort to other legislators and, indeed, other branches of government to press their cases and gain reinforcements for their causes.²²¹ A citizen who does not like a controversial gun law may attempt to challenge it in court, seeking to have it narrowly interpreted or struck down as unconstitutional. Or, he may ask the executive branch to interpret or enforce the law more to his liking, or to wield its veto power or political power to prod legislators to change their views.

In the judicial sphere, by contrast, most litigants have nowhere else to go to gain adherents for their "self-interest" in having a law narrowed or overturned. By the time they arrive in litigation, it is usually too late to change the law through legislation or executive action, at least for their own case given the number of legal rules that cut against retroactivity.²²² Moreover, because of the relatively narrow view American jurisprudence takes with respect to the judge's ability to "make law" or to overturn laws on constitutional grounds,²²³ the opportunity for judges to support the "interest" of the litigant is quite circumscribed. Indeed, by the time litigants arrive in court, they are usually at a place of "last resort," having exhausted all other political and practical options for achieving their own "self-interest."

Finally, as Justice Stevens opines, we continue to harbor the notion that judges should not represent community interests so much as they should represent the law, and ultimately, justice.²²⁴ As he notes, this distinction is critical to understanding the difference between legislative and judicial elections.²²⁵ A legislator in a democratic system may legitimately say that he is trying to represent the immediate concerns of the community, or the majority of a community, when he votes for a particular law. However, his job is not to enforce the law or the Constitution, and so his concern about how his action will comport with existing law is often minimal. Indeed, legislators rarely vote against laws based on their unconstitutionality, even though there is no reason to believe that the Framers meant for legislators, any more than

221. See Daniel Burke, Colloquy, *Code of Judicial Conduct Canon 7B (1)(c): Toward the Proper Regulation of Speech in Judicial Campaigns*, 7 GEO. J. LEGAL ETHICS 181, 203 (1993) (noting that judges are not constrained by the need to get additional legislators' votes).

222. See, e.g., John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C. L. REV. 745, 746-47 (1983) (describing the rise of constitutional retroactivity analysis after 1965).

223. See Behrens & Silverman, *supra* note 61, at 288 (noting that judges do not have the job of formulating policy).

224. Republican Party of Minn. v. White, 536 U.S. 765, 798-99 (2002) (Stevens, J. dissenting) (describing duty of judges to uphold law, not public opinion).

225. *Id.* at 798 (Stevens, J., dissenting).

judges, to flout the letter and spirit of the Constitution.²²⁶ Judges, by contrast, are expected to uphold a much longer community tradition that is embodied in the common law, statutes, and constitutions, particularly in those cases where the long-held community tradition comes into conflict with short-term community "passions" and interests.

Judges who represent "interests" in their election campaigns, even if these interests are seemingly intangible ones, cannot represent this long tradition against short-term miscarriages of justice, a concern Justice Stevens expresses strongly.²²⁷ It is not simply a problem of improper appearance if judicial candidates consider only part of the community as deserving of justice when they announce how they will rule on particular issues. By signaling their views in this manner, there is the reality that they cannot represent the larger and more diverse traditions embodied in the law.

The second concern raised by judicial elections "impartiality," is that electoral candidates will feel beholden to those who make their election possible.²²⁸ The quality of beholdenness reaches toward the past rather than the future, and it is more often a virtue than a vice. It is a moral human being's recognition of what has been done for her by others, an acknowledgement that her life is dependent upon other persons, as MacIntyre suggests,²²⁹ and an attitude of gratitude toward those who have given her gifts.

One aspect of the concern with judicial beholdenness is the debate over provisions of the judicial canons dealing with whether candidates can affiliate with parties and attend party functions where they solicit donations. This debate evinces the fear that a judicial candidate may feel a sense of beholdenness to parties with which she is affiliated, to donors, or to those who otherwise helped her get into office.

In post-*White* cases, challengers have objected to canons preventing them from appearing at political events or from being endorsed by a political party, in some cases successfully.²³⁰ While these canons do not directly hin-

226. See Vic Snyder, *You've Taken an Oath to Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897, 916-17 (2001) (noting that while legislators are sensitive to constitutional concerns, they are not judges).

227. See *White*, 536 U.S. at 803 (Stevens, J., dissenting).

228. *Id.* at 789-90 (O'Connor, J., concurring).

229. See MACINTYRE, *supra* note 151, at 116-17.

230. See *Republican Party of Minn. v. White*, 361 F.3d 1035, 1044 n.6 (2000) (8th Cir. 2004) (remand considering Canon 5 restrictions on partisan activity), *vacated by and reh'g en banc granted*, No. 99-4021/4025/4029, 2004 U.S. App. LEXIS 10232 (8th Cir. May 25, 2004); GASS, *supra* note 3, at 3-4; T.C. Brown, *Judicial Candidates Free to Reveal Their Politics: Restrictions Ruled Unconstitutional*, THE PLAIN DEALER, Sept. 15, 2004, (noting apparently unreported federal court decision declaring unconstitutional Ohio canons restricting candidates' abilities to declare their political affiliations and restricting how they can use the term "judge" if they are running for a different office than the one they hold).

der the possibility of corruption, they deter, if not eliminate, the interest of political parties in demanding adherence to party platforms from judges as a condition of their receipt of campaign funds. Even when there is not a direct demand by the party to get in line with its views, in those states that have partisan elections, judges may feel indirect obligations to "announce" on issues that follow the party platform because of the assistance they have received.²³¹ And, to the extent that political events are places where support money traditionally changes hands, judicial candidates are tempted to feel that something is expected from those who link them with donors, as much as from the donors themselves. In addition to curbing direct self-interest by stifling many possibilities for direct payoffs, financing screens focus on this concern that judges will feel beholden to donors, as do clauses in the canons that concern pledges or promises, an issue to which I will later return.

It might seem immediately obvious that judges should not be beholden to others for their livelihood. But this claim really cuts against two basic moral principles. First, when someone has provided us with an advantage, unless that advantage is clearly given as a gift, we consider it only right to repay the giver—basic contractual notions such as implied contract, quantum meruit, and others are the legal embodiment of that principle. Second, in the case of a gift, we may well have the moral duty to demonstrate our beholdenness and gratitude to those who have made it possible for us to be where we are today—parents, teachers, employers, spouses, friends, and those who have provided specific resources such as opportunities and money.²³² To be sure, this is a "softer" duty—unlike *quid pro quo*, the giver does not have the same right to demand enforcement—but it is a moral duty nonetheless. Indeed, we would consider a person who repaid others' support for his efforts with inaction or indifference as an ungrateful person, or one who takes advantage of the generosity of others. A moral person generally feels beholden to those who have helped him achieve professional success.

Elections tend to create beholdenness. Virtually no candidate gets elected on her own efforts, and virtually every elected candidate should properly acknowledge help from supporters, family members, friends, volunteers, donors, and the media. Again, however, there is a substantial difference between the virtue of recognizing our beholdenness in legislative elections and in judicial selection, one that cuts against the value of elections for choosing judges. While we discourage vote-buying, that is, beholdenness to individual voters or supporters based solely on money, to a certain extent we do expect legislators to feel a sense of obligation to those who put them into office.²³³ A

231. See MATHIAS, *supra* note 59, at 40 (noting appearance of cross-endorsement and of bias on issues that attends partisan involvement); Behrens & Silverman, *supra* note 61, at 281-82.

232. See, e.g., WILLIAM F. MAY, THE PHYSICIAN'S COVENANT: IMAGES OF THE HEALER IN MEDICAL ETHICS 116-17, 121-24 (2000).

233. See, e.g., Stretton v. Disciplinary Bd., 944 F.2d 137, 142 (3d Cir. 1991) (noting that "the public has the right to know the details of the programs that [non-

legislator who turned his back on the constituents who helped get him elected, who did not feel responsible for caring for their interests as he promised to do during the election, would probably be a one-term legislator because voters would consider him without integrity.²³⁴ A legislator who did not reward those who worked for him with staff employment or other legitimate perks of office would, at the least, be considered unusually straight-laced, and in some circles, positively immoral or anti-democratic.²³⁵

By contrast, we have not traditionally wanted judges to feel beholden to those who put them into office, with the possible exception of rewarding a few faithful helpers with the small number of "perks" the judge has available, such as clerkships and court reporter jobs.²³⁶ The most important power the judge has is to render justice, to seal a legal decision for a particular litigant. If the judge felt beholden to particular supporters for their gifts, and believed that he was morally obliged to rule in their favor (i.e., to exercise favoritism) whenever they appeared before him, we would accuse him of bias or partiality. Not only can justice not be sold, it cannot be recompense for what a judge has received from others.

Thus, we might argue, what is a "virtue" in a legislator, his moral instinct to take account of those who have supported him in his bid for election, quickly turns into a "vice" in a judge. It is difficult enough for judges to go against their moral instinct to acknowledge their dependency on others and their beholdenness to those who have helped them achieve their office in an appointment setting. If we make judges run for election as well, we are asking them to display a sense of beholdenness *during* the electoral process, enough to inspire supporters to rally behind them, and then to abruptly abandon that

judicial] candidates propose to enact into law and administer. Pledges to follow certain paths are not only expected, but are desirable so that voters may make a choice between proposed agendas that affect the public. By contrast, the judicial system is based on the concept of individualized decisions . . ."); *ACLU v. Fla. Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (noting that political candidates are expected to announce programs, expect results and advance political group interests, unlike judges).

234. Justice Ginsburg makes the same point about judges who rule inconsistently with their "announcements" on issues. See *Republican Party of Minn. v. White*, 536 U.S. 765, 816 (2002) (Ginsburg, J., dissenting).

235. For a discussion of the alleged impact of patronage on democratic politics, see, for example, *Rutan v. Republican Party of Ill.*, 467 U.S. 62, 103-06 (1990) (Scalia, J., dissenting) (discussing perceived necessity of patronage as reward for faithful party service); *Branti v. Finkel*, 445 U.S. 507, 530-32 (1980) (Powell, J., dissenting).

236. See, e.g., *White*, 536 U.S. at 789-90 (O'Connor, J., concurring); Kate Thomas, *Are Justices in Texas Getting Bought?*, NAT'L L.J., Mar. 16, 1998, at A8 (reporting that a study by the public interest group Texans for Public Justice found that 40 percent of the \$9,200,000 in contributions of \$100 or more raised by seven of Texas' nine Supreme Court justices for their 1994 and 1996 elections "came from parties and lawyers with cases before the court or contributors closely linked to these parties").

attitude once they have been elected. Or, conversely, we tempt judges to continue to act after election as persons beholden to others despite the harm that such behavior can cause. The threat to a judge's personal sense of integrity caused by these conflicting demands cannot be overstated.

B. Impartiality as a Lack of Preconception, and Judicial Reasoning

Justice Scalia proposes a second definition of judicial impartiality: lack of preconception about a particular legal view.²³⁷ As he quite fairly notes, it is difficult to imagine a competent judge who had so little knowledge of, or experience in, the law that he would not have come to at least some initial thoughts about how it should fairly be read or applied.²³⁸ Indeed, we might suspect that such a judge was amoral, i.e., did not think in moral categories as he considered how the law is applied and enforced in his own communities. Inability to think in moral categories at all would seem to be a significant character flaw in a position that requires the exercise of moral and ethical judgment on a constant basis, albeit consistently with the legal norms set out by the broader community.

Elections, like it or not, do not tend to test well the virtue of impartiality defined as a lack of preconception.²³⁹ Because of the need for versatile lawmakers and executives, electoral politics are good at identifying strong candidates who yet do not have "actual knowledge or experience" on many of the issues on which they will lead the nation or a particular local community. In fact, if anything, a virtuous electoral politician is one who has the gift of reacting, deciding, and leading quickly in the face of even the most unimaginable set of facts, when little is known about the actual state of affairs. There is a reason that Michael Moore was able to successfully mock President Bush for continuing to read to schoolchildren for seven minutes after he was informed that the country was under attack on September 11th.²⁴⁰ Moore tapped into the intuition that we are much better off with a political leader who acts quickly and decisively in the face of little information in order to reassure the public that we are not vulnerable to the unknown—even if he is later proven wrong—than with a leader who delays action until he is very sure of all of the facts.

237. *White*, 536 U.S. at 777.

238. *Id.* at 777-78.

239. In Merriam-Webster Online, *supra* note 199, "preconception" is defined as "prejudice," to "preconceive" is "to form (as an opinion) prior to actual knowledge or experience." "Prejudice" is defined as a "preconceived judgment or opinion," "an adverse opinion or leaning formed without just grounds or before sufficient knowledge," or "an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics." *Id.*

240. See Scott Shepard, *Election 2004: Kerry Says Bush Slow to React to Terror Attacks*, ATLANTA JOURNAL-CONSTITUTION, Aug. 6, 2004, at A10 (noting that Moore's film depicts Bush as unprepared to respond to the attacks).

But another concern may well lurk in the background—the view that judges should rule “without bias.” As I have previously suggested, there is some implication in the use of these terms that bias constitutes an emotional reaction and impartiality a rational reaction, that the former is illegitimate for a judge and the latter necessary. Justice Stevens’ opinion adopts this view, at least implicitly, by stressing the importance of a judge following “the precedent of that court, not his personal views,”²⁴¹ while Justice Scalia seems untroubled with a judge following his personal views so long as he applies the same views to everyone.²⁴²

Yet, the notion of impartiality as pure rationality has been debunked as representing an extreme and unhealthy understanding of the practice of judging.²⁴³ Moreover, this distinction between impartiality as reason and bias as emotion displays a modern ideology that all of life can be separated into a public sphere (including judging) where cool, logical, or empirical rationality reigns and a private sphere where warm, illogical, value-laden emotions reign supreme.²⁴⁴ As Justice Scalia might even say, it is disingenuous to suggest that a judge can separate herself from her emotions when she assumes the bench; only an automaton or a computer could do so.

In probing the definition of impartiality as “open-mindedness,” however, Justice Scalia does capture the grain of truth in the claim that judges should make “reasoned” judgments. In Justice Scalia’s view, open-mindedness would mean that judges are required to “consider views that oppose [their] preconceptions, and remain open to persuasion, when issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an equal chance to win the legal points in a case, but at least some chance of doing so.”²⁴⁵

241. See, e.g., *White*, 536 U.S. at 799 (Stevens, J., dissenting).

242. See *id.* at 776-77 (noting that if a judge has a view about the law, anyone who comes before him is likely to lose or win).

243. Professor Martha Minow, for one, has argued that to take a strict view about the separation of rationality and emotion is to exclude very important judicial virtues from the public process of reasoning, such as the virtues of compassion and understanding. Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 50-51 (1998).

244. See WAYNE C. BOOTH, *MODERN DOGMA AND THE RHETORIC OF ASSENT* 13-19 (1974) (discussing scientismic and irrationalist views of the world). Yet as opponents of the modern dogma have shown, very little of importance in life is demonstrable by rationality, so narrowly defined—virtually any “fact” can be shown not to be true “without doubt,” and virtually any factual regime is pervaded by assumption and valuation, even so-called “hard” sciences such as physics and biology, since the mere fact of classification must be based on some idea about what is valuable to know and to distinguish. *Id.* at 93-95, 103-04. See also Daugherty, *supra* note 22, at 317-18 (discussing the formalism-realism debate as influencing judicial selection mechanisms at the turn of the century).

245. *White*, 536 U.S. at 778.

Aristotelian rhetoric understood that to give a "reasoned judgment" to an audience required the reason-giver to take into account the character of the speaker himself (*ethos*), the reality of the subject matter about which he speaks (*logos*), and the character of the audience focusing on how they will respond to what he says (*pathos*).²⁴⁶ A key virtue of judges is that they wait to get a complete picture of the facts and applicable law before they decide. They should have reasons for their judgments, and they should have good reasons, that is, reasons which would persuade any fair-minded person or any fair-minded community that the judgment they have come to is the right one or at least one of the possible right ones. These reasons not only display that the judge has waited to hear all of the evidence, but also that she has "reasoned" in a way that considers her own voice as well as the concerns of her multiple audiences, both litigants and community, and the limits of the law that she is to apply (*logos*). That ability to give reasons which a community can accept as good, whether she personally agrees, is the cornerstone of the judge's ability to command respect for the legal process and for the law itself.

Again, we run into a significant problem when we think about elections providing voters with sufficient information to know whether a candidate can make "reasoned" judgments. For appellate judges, this might be possible if voters cared to read judicial opinions. They can tell whether the judge is exercising good (read as competent as well as morally worthy) rhetorical skills. For appellate challengers, and most trial bench candidates, however, we might well wonder where the evidence would come from to make these kinds of judgments. With the exception of the federal bench, virtually no trial judges will have full enough written records to be judged on how well they reason about a case in this broader sense, and except in those states with a full-blown judicial watch program, there will likely not be good enough oral records either. By contrast, a selection commission that is able to demand recommendation letters and references from judicial candidates, or even survey lawyers familiar with the candidates, may at least get some handle on whether a judge can give good reasons for his decisions.

C. Judicial Reflectiveness with Independence

One judicial virtue closely related to the virtue of holistic engagement in considering a case might be termed the virtue of reflectiveness with independence. By reflectiveness, I mean to capture two necessary traits in a judge: first, the ability of a judge to wait until she has received sufficient evidence and information about the law to make a good decision, which Justice Ginsburg tries to capture in the notion of due process. Second, I mean the judge's willingness to habitually think through what she must do in a timely yet de-

246. Marie A. Failing, *Not Mere Rhetoric: On Wasting or Claiming Your Legacy*, *Justice Scalia*, 34 U. TOL. L. REV. 425, 435, 468 (2003).

liberative fashion.²⁴⁷ That is, there is a temporal dimension to the virtue of reflectiveness: a judge must have a good instinct for how much time she needs to fully think through a problem, and advise the parties accordingly, being neither too hasty nor too dilatory.

There are any number of character dimensions that are embraced in the virtue of reflectiveness. For example, a good judge must be able to be decisive after an appropriate time, a virtue which apparently some judges must lack, given the evidence that judicial delay in rendering decisions is one of the most frequent complaints to state judicial accountability boards.²⁴⁸ She must be capable of performing the lawyerly task of balancing the information she has to reach a wise resolution, both in terms of who will win and in terms of a remedy. This need imposes on her the duty of examining the pros and cons of various alternatives thoughtfully and wisely, the skill of *phronesis*. Similarly, the virtue of reflectiveness demands that she exercise the virtues of patience and perseverance, that she be capable of waiting until the appropriate solution becomes clear, and that she be willing to continue to work on the problem until she comes to that solution.

And the judge must be capable of doing so "independently" for the most part, a virtue that transcends even as it is necessarily linked to impartiality, as the *White* concurring and dissenting opinions suggest. That is, a judge must have the gift and willingness to sort through the evidence, the law, and the alternatives by herself, deciding a difficult abortion by-pass or sentencing case without the benefit of consulting the community or even trusted advisers about what to do, unless those advisers are fellow members of the judiciary or perhaps an occasional law clerk or staff member.

The virtue of independence requires not only the self-confidence to make a lone judgment and the courage to bear the consequences of community disapproval,²⁴⁹ but also the ability to think through something by oneself. This is true for both trial and appellate judges even after they have exhausted the lawyers briefing the issues in the case, and even when they have colleagues who will be part of the decision-making team on appellate benches. The good half of the lawyer population²⁵⁰ that is used to working out prob-

247. See Noonan, Jr., *supra* note 176, at 1130 (noting true fortitude is resolve, determination, firmness and patience in waiting until the end of the inquiry the mean between stubbornness and vacillation).

248. See, e.g., MINN. BD. OF JUDICIAL STANDARDS, ANNUAL REPORT 2004, at 6 (noting that delay was third on the list of complaints against Minnesota judges in 2004, trailing only discrimination and decorum).

249. See *White*, 536 U.S. at 806 (Ginsburg, J. dissenting) (noting that "[I]t is the business of judges to be indifferent to popularity." . . . They must strive to do what is legally right, all the more so when the result is not the one 'the home crowd' wants.") (quoting *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991)) (alteration in original) (citation omitted).

250. See Lawrence R. Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States*, 29 CAP. U. L. REV. 979, 1015 (2002) (noting

lems in their heads rather than in conversation with others has a strong head-start at making good judges. Such "hard-wiring" is a gift for judges as well as many lawyers, but it is a gift not easy to cultivate, or to get rid of.

By contrast, as I previously alluded to, electoral politics neither favors nor rewards individuals who have the gifts of judicial reflectivity and independence. As earlier suggested, good—one might say virtuous—politicians are those capable of responding quickly and reflexively to new demands, questions, and problems, not necessarily thoughtfully and methodically by taking the necessary time to think through a problem. A campaigner who responded to press questions or constituent entreaties by saying, as a judge might say, "let me take that under advisement and I'll get back to you when I've thoroughly read the record" would be not long for the political world. That is not to say we do not expect traditional politicians to act only on the basis of incomplete information, but only that we do not—properly, to my mind—expect them to do that work themselves. Rather, for complex systemic problems or social issues, they employ campaign managers or staffers to do the work for them and to present the results of such careful thought to the campaigner. Those results may appear as a complete "package" for the candidate to accept or reject, or as an "options" paper which describes what choices the candidate might have in a "bullet" memo suggesting the potential consequences of each choice.

A traditional politician can continue to operate in this fashion even after he is elected, utilizing aides or staff from the executive or legislative branch, or even lobbyists, to do the methodical reflective work of thinking through a problem and the available solutions. By contrast, if we begin to elect (or currently elect) judges who are not skilled in the task of methodical reflection, two traditionally "unjudicial" phenomena might become more prevalent. First, we might see an increase in the number of judges who pretend to have no intellectual interest or ability in the law and legal judgment and who are impatient with learning or reflecting on what the law might require in a particular case. As a result, we may see an increase in judges who operate their courtrooms through instinctive "seat of the pants" judgments that have little relationship to "the law" as described in statutes and their legislative histories, or common law precedent. While intuitive judging has its merits, a potential demerit of such judging is that judges will increasingly utilize erroneous factual assumptions or prejudices unknown even to themselves to decide cases, assumptions and prejudices which cannot be even mildly checked by the legal rules that challenge them.

Or, conversely, if judges follow the political practice of delegating the reflective work to their staff, we might see a very different relationship emerging between judges and their clerks and other staff. Instead of supply-

that 56.4 percent of respondents in a lawyer satisfaction study preferred introversion, while in the original Meyers study of introversion/extraversion in the American population, 64.9 percent of the high school student sample she studied were extraverts).

ing legal research and legal options to the judge, we might find that the clerk or staff members constituted the real "power behind the throne," the people whose reflection and advocacy really made the decision happen, like the politician's staff. While this would not necessarily subvert judicial accountability, for elected judges would be just as ultimately beholden to voters as any politicians and would have to ratify the views of their clerks, it would certainly change the public view of what judges do. Even today, judges who are thought to be puppets of their clerks, or whose clerks are thought to do all of the work of arriving at as well as writing opinions, are looked down upon in the legal profession.²⁵¹

Similarly, the ability—one might say virtue—of being able to think through a problem and come to a solution in isolation, as an introverted lawyer is capable of doing, is very much contrary to the virtue of openness that we expect in our politicians. Politicians are considered good—indeed, one might say virtuous—when they seek out the advice and concerns of others, both voters and experts, as they work through their position on issues with others. They are beholden directly to other human beings, expected to "cater" to their needs and desires, rather than standing apart from those demands and trying to come up with a just solution, comporting with some abstract principle of law. Indeed, we need politicians who, if you will, need the rest of us in order to decide what they should do, in order to preserve both the appearance and reality of democratic decision-making. It is thus no surprise that extraverts make good politicians.

By contrast, most litigants would undoubtedly—and I believe properly—be shocked if a judge took their case out to a series of community meetings to solicit advice on how to resolve it, and made a judgment based on what seemed to please most of those with whom he met. First, there is the obvious question of the judge's higher fidelity. In a handful of judicial election violation cases, where judges have been disciplined for advertising in their campaigns that they would "help" the police or decide cases according to the community's views on a particular issue such as law-and-order, courts have found violations on the basis that the judge's higher duty is to the written law and not to the immediate community sentiment.²⁵² Of course, these statements are, it seems to me, somewhat disingenuous in that no sensible judge can or should entirely ignore community sentiment on various issues. However, they do suggest that a judge needs to be capable of divorcing himself from immediate sentiments that might arise especially in controversial cases, and trust the long-term and more balanced judgments that the elector-

251. See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 288-89 (1996) (discussing the diminishing quality of opinions as clerks do more writing).

252. See *supra* notes 87-89, 123-126 and accompanying text.

ate has made in (hopefully) carefully considered laws, as Justice Stevens suggests.²⁵³

Second, a trial judge who ran around the community asking for people's opinions on cases might well be accused of bringing individual litigants into disrepute, unduly publicizing their conflicts by "airing their dirty laundry in public." While court cases are generally public, most litigants do not expect to find themselves the subject of gossip in community centers and organizations unless their cases involve some "hot-button" issue for the community, such as public safety or morals. It is not clear that raising the visibility of court cases is likely to result in better justice, better relationships between the parties, or a better understanding of the decisions and process in these cases than the current system of maintaining public but low profiles for most cases.

Third, to return to the issue of judicial independence, as we can see from several of the elections violation cases,²⁵⁴ trial judges who consult with and are responsive to communities might well signal that they have already prejudged the merits of the case in the sense that they are willing to side with the litigant who is most liked and favored by the community. In Judge Kinsey's case, for example, her pervasive references to her ties with the police and her willingness to "bend over backward for them," and her stated interest in reflecting the community's wishes in her decisions sent the message: there will be no fair-minded evaluation of your case by this judge.²⁵⁵

Fourth, judges who frequently consult the community on specific cases might be thought to be indecisive, or worse, unwilling to be courageous in the face of public opposition. So long as courts provide any majority-checking functions at all, the lack of courage in judges constitutes a major disability in the administration of justice. Electoral politics, in fact, test the ability of political leaders to think on their feet and react plausibly and confidently with a limited set of information. Virtually any visible national candidate will be required to come up with a response to the media within hours, if not minutes, of a historical surprise, such as the al-Qaeda attack on the Spanish trains, or a Supreme Court decision on affirmative action. To be electable, virtually any politician will need to have the capacity to modify his views about political subjects from gay marriage to the means of war as it becomes apparent that a majority disagrees with those views, while giving the impression that these modifications represented his views all along.

While such modifications of positions are often treated as pandering by the press and opposition parties, it is hard to see why we wouldn't want a political leader to be willing to quickly modify his views if he becomes convinced that the majority opposes his original position—he is, after all, sup-

253. *White*, 536 U.S. at 803 (Stevens, J. dissenting).

254. See, e.g., *supra* notes 87-89, 123-128 and accompanying text.

255. *In re Kinsey*, 842 So. 2d 77, 80, 87-89 (Fla. 2003) (holding that judge made unethical "promises and pledges" to support officers and to "bend over backward" to give favorable treatment for law enforcement parties and witnesses).

posedly elected to represent their views, not his own. The willingness to adapt to shifting political winds is at least arguably a political virtue, though like all virtues, it can be distorted by an imbalance with others, such as political integrity of the kind just discussed with judges.

By contrast, the whole point of due process as we conceive it in this country is to afford litigants a full and fair opportunity to be heard, and judges "do" nothing if not affording due process. A judge who attempts to react confidently to limited information by making a decision halfway through the presentation of the facts in a trial is not considered a good leader; she is considered hasty, unfair, and perhaps even rude. A judge who gives the impression that he is modifying his views about the requirements of justice as he encounters strong opposition from litigants to his proposed course is not considered adaptable; he is considered weak and indecisive. What we mean by "open-minded"²⁵⁶ is, then, precisely the patience to listen to the views and stories of other people until it is no longer prudent to do so—that is, until those views and stories provide no new information reasonably useful in making a decision.

It is easy to see, then, why elections would be a very good way to test the qualities of a state official whom we wanted to be decisive in the face of limited information and adaptable to voter preferences. It is not so easy to see why we would want to use elections to test whether judges can make quick judgments that change with voter preferences. Judges should have the virtue of reflectiveness; that is, they should take their time to hear all of the evidence before deciding a case, not jump to hasty conclusions to reassure the public. They should be willing to recognize the effects of their rulings on the community, but not simply to mimic community sentiments, as politicians are expected to do.

D. The "Vision" Thing and the Judicial Virtue of Being Methodical

An additional virtue that good political candidates tend to possess is the ability to understand and translate the "big picture" into concepts that can be understood by virtually every voter, no matter what his background, intellect, or educational level. That is, the best politicians can inspire voters with a vision of the future that encourages them to give their money, their time, or their votes. By creating a common vision for a future, whether within their own party, local community, or the country as a whole, good politicians can use persuasion to marshal human resources and good will in a particular direction to make an alternate future possible.

However, here the realities of human limitation and "hard-wiring" once again come into play. Politicians who are charismatic in this sense—able to inspire voters to join together to work toward a common destiny—are not

256. See, e.g., Merriam-Webster Online, *supra* note 199 (defining "open-minded" as "receptive to arguments or ideas").

usually gifted with the skills of careful and methodical follow-through necessary to get the job accomplished. To illustrate this point, we might look at the debate about the relative success of Presidents Jimmy Carter and Ronald Reagan, both of whom are widely regarded as personally virtuous and yet whose political platforms and roots were dramatically different. The common political wisdom, at least, is that Ronald Reagan was a better politician because he was skilled at creating a simple, clear, and optimistic vision of the future while handing off the details of accomplishing that vision to others. By contrast, President Carter is faulted because he was detailed-oriented and micromanaged many aspects of his administration.²⁵⁷

Similarly, judicial candidates who have the charismatic presence, vision, and translation powers to describe to voters, with passion, the nature of justice in their community, are unlikely to also have a detail-oriented, methodical mind. Yet, particularly in the trial courts, not having a judge who delights in, is patient with, and is well-suited to handling detail would strike most lawyers as alarming. It is difficult to imagine how a judge who was good at "the vision thing" but not at processing details and information methodically and efficiently could ever preside over a lengthy trial. Much less, in an era of shrinking judicial budgets, could such a judge competently handle the expanding array of administrative responsibilities delegated to trial court judges, ranging from technological innovation and human resources policies to state commission reports on juvenile justice or proposed rules of evidence.

If traditional electoral politics becomes the standard way of selecting judges, and if the only people who can be successful candidates in that system are the charismatic and extraverted candidates who can "do" the "vision thing," then we can expect to have many fewer introspective and methodical judges on the bench. Any lawyer wise enough to know that his skills are in the careful pursuit of detail, and not in "the vision thing," will be unlikely to throw his hat in the ring, realizing that he has no chance of winning.

V. THE COMMON VIRTUES IN THE JUDICIAL OFFICE

In addition to those traits of character that are perhaps somewhat unique to the business of judging, we might identify other virtues that any person who occupies a public office should have, but that take on a particular cast in the office of judge. In this Section, I will briefly highlight three that pertain to

257. See, e.g., Michael Eric Siegel, *Probation and Pretrial Chiefs Can Learn from the Leadership Styles of American Presidents*, 64 FED. PROBATION 27, 30 (2000) (describing public impression of Carter as micromanaging and indecisive compared to Reagan's appearance of decisiveness, and his focus on policy and vision while delegating major responsibility to staff); Elliot E. Slotnick, *Presidents and Their Judges*, 81 JUDICATURE 172, 175-76 (Jan.-Feb. 1998) (reviewing SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997)) (describing Carter's micromanagement of the judicial selection process compared to Reagan's lack of personal involvement in the process).

the problems I have been discussing with judicial elections: the virtues of fidelity, humility, and honesty.

A. Fidelity as Faithfulness to a Past

For judges, as with other political figures, fidelity is a key virtue. But the judicial virtue of fidelity is distinctive. From a MacIntyrean perspective, we can easily see why fidelity is important to carrying on any tradition, but I would suggest that the need for fidelity in judges runs even deeper. Among the first things new students of the law learn is the importance of precedent and *stare decisis*, that is, the need to not only account for the past, but to accord it presumptive weight in reaching a decision. Even though their sway over the course of judicially made law has clearly eroded in the past half-century, precedent and *stare decisis* still exercise a profound impact on judicial reasoning. In a common law system, MacIntyre would argue that the exercise of precedential reasoning is a good that is internal to the practice of judging, and, as such, is a necessary skill as well as an intellectual virtue.²⁵⁸

But in a more profound sense, precedential reasoning, and its companion virtue, fidelity, are profound challenges to the assumptions of modernity and more broadly, to the practices of political decision-making. Comte-Sponville suggests how counter-natural the virtue of fidelity appears to the modern mind:

[r]eality, from moment to moment, is always new; and this complete, this perennial newness, is the world. Nature forgets, and it is in forgetting that its materiality resides. Matter is forgetfulness itself; only where there is mind is there memory. Oblivion, therefore, will have the last word, just as it had and always will have the first word.²⁵⁹

As Comte-Sponville describes it, "[f]idelity is the virtue of memory; it is memory itself as a virtue Fidelity is neither fickle nor stubborn"²⁶⁰ By contrast, in Comte-Sponville's description, modernity is profoundly natural, profoundly material, profoundly anti-memorial in its orientation. The idea of progress, a key modern category, is dependent on the superiority of the new over the old.²⁶¹ The modern emphasis on choice as a critical category for human flourishing depends on the value of the new and unique. Those who have the means to do so choose clothes and cars, build houses, and shape careers based on an attempt to construct a unique self that cannot be replicated by any other person now or in the future.

258. MACINTYRE, *supra* note 9, at 90-91.

259. COMTE-SPONVILLE, *supra* note 172, at 17.

260. *Id.* at 19.

261. I owe this insight to Prof. Patrick R. Keifert.

In this way, modernity emphasizes a profoundly different relationship between tradition and the future than Arendt's account, in which those who distinguish themselves in the process of natality are firmly embedded in a culture.²⁶² Arendt's heroism, the display of the self through distinctive actions and speech, is grounded in and depends on the tradition to make sense of those distinctive actions and speech.²⁶³ When one demonstrates one's excellence through speech, for example, the content of that speech (as Arendt mythologizes) is often traditional—one gives a great speech about the past deeds of one's countrymen or the values that one's society has held dear.²⁶⁴

Similarly, today's electoral politics is profoundly modern. Even so-called conservative politics tends to be boldly ahistorical, wanting to reach back and capture particular historical moments and graft them onto a future, as if certain parts of history had not intervened. Perhaps a powerful set of "era-recovery" examples are found in the so-called "religious right's" conservative desire to "recover" the nuclear family and the Taliban's attempt to return Afghanistan to an "Islamic" culture. The focus on recovery of the nuclear family is often captured in a media image from the 1940s or 50s, such as *Father Knows Best* or *Leave it to Beaver*, two TV families in which a Caucasian middle class mother and father exercised wisdom and firmness in developing the character of their young children.²⁶⁵ Both the Taliban's attempt to recover a culture that has not existed for more than several hundred years²⁶⁶ and the nostalgic reach to an American past by conservative commentators are profoundly ahistorical because they depend on wiping out of memory those changes in human culture that have occurred since the historical moment to be recreated. In quite a "modern" vein, these movements assume that we can simply "choose" a tradition or cultural period to replicate without any recognition that intervening history has constrained as well as freed the possibilities for recreating human culture. For examples, to go back to a time before the Enlightenment or before the advent of human rights is culturally impossible.

By contrast, the judicial task, particularly as focused on precedential reasoning, is a task of memory. To be sure, as Comte-Sponville suggests, not

262. See HANNAH ARENDT, *THE HUMAN CONDITION* 177-78, 183-85, 204 (1958) (discussing action as the process of beginning and as a disclosure within the web of human relationships, and noting the necessity of memorializing great deeds of the past).

263. See *id.* at 185.

264. *Id.* at 17-21 (discussing the immortality of action).

265. See Cynthia C. Siebel, Ph.D., Comment, *Defining Fatherhood: Emerging Case Law Reflections of Changing Societal Realities*, 2 WHITTIER J. CHILD & FAM. ADVOC. 125, 140 (2003); *Leave it to Beaver* (CBS & ABC television broadcast, 1957-63); *Father Knows Best* (CBS & NBC television broadcast, 1954-60).

266. Lynn N. Hughes, *Realism Intrudes: Law, Politics, and War*, 25 HOUS. J. INT'L L. 415, 425-26 (2003) (noting Taliban's mixture of nostalgia for the thirteenth century and use of modern technology and institutions).

all remembering is virtuous. For example, if we bear a grudge against someone our whole lives because of a remembered slight, that does not constitute virtue.²⁶⁷ Similarly, any law student understands the problem with "too much remembering" and too literal a reliance on precedent and *stare decisis* to respond to modern problems.

Yet, the task of memory in faithfulness to the law that we find in virtuous judging is in the nature of promise-keeping. It is the task of keeping the promise of the law as a constant for individual citizens, worthy of being counted on, despite the fickleness of political fads that the majority may find attractive from time to time. That task is not simply in remembering the past ahistorically, selecting some particular historical moment as idyllic and attempting to replicate it in the contemporary situation. Rather, it is the task of taking the body of law, warts and all, its high points and its low points, and accepting that entire history as "the law and the precedent," even if part of the job of accepting the history is to critique and modify it. To make a dangerous analogy, it is much like the difference between remembering a marriage through its "highlights" and remembering a marriage through its ups and downs.

On this account, it is easy to see why democratic elections are not particularly useful vehicles for testing the virtue of fidelity, so understood. Despite President Reagan's query, "Are you better off than you were four years ago?"²⁶⁸ elections are not well-designed for testing whether government officials have exercised faithfulness to our traditions. Virtually no politician is electable primarily on the explicit premise that, "I understand what happened in the past, and how it should apply to the present." Instead, politicians want to promise some imagined future where things will be better than they are today, some "new and improved" scheme for rectifying a social problem, even if it rests upon old notions—e.g., the "new" welfare programs that rest upon old saws like work requirements.

Although this is a matter of debate among judicial review theorists, the standard wisdom is that we do not want judges to be primarily driven by what some have called "social engineering" and others "law reform," because of the imagined place of judges in the constitutional scheme.²⁶⁹ It is a rare judge who will not be criticized if his opinions take no account of tradition, remembered not selectively, but thoroughly. It is not clear, however, how a standard

267. See COMTE-SPONVILLE, *supra* note 172, at 20 (citing Vladimir Jankélévitch, *Les Vertues et L'amour*, 2 TRAITÉ DES VERTUES 140-42 (1986)).

268. Gerald Owen, 'You Never Had it So Good' and Other Slogans: The Trick is to Find a Political Phrase That Sticks, NAT'L POST, May 29, 2004, at RB2, available at 2004 WL 79303838.

269. See, e.g., Republican Party of Minn. v. White, 536 U.S. 765, 799 (Stevens, J., dissenting) (noting that judges have a duty to uphold the law and follow the dictates of the Constitution and the precedent of the court, not personal opinions or public polls).

electoral "platform" will properly "test" for a judge's fidelity to the tradition and practice of justice in any meaningful sense.

B. Humility as Sympathetic Self-effacement

Brett Scharffs has argued that the real problem for judges is that they are charged with the responsibility to exercise both justice and mercy, and that the only way they can accomplish both is by exercising the virtue of humility.²⁷⁰ In doing so, he takes issue with Anthony Kronman's understanding of "impartial" judging, which Kronman argues must involve two contrasting virtues, sympathy and detachment.²⁷¹ Sympathy is a midway point between what Kronman calls completely detached "observation and identification or endorsement," i.e., outright acceptance.²⁷² Detachment, judging's other pole, is also a mean: it is to "withdraw [from possible forays into the future] to the standpoint of decision, the position [a judge] occupies at present."²⁷³ For Scharffs, Kronman's account may put the judge into the "ballpark" of right behavior, allowing her to avoid these two damaging extremes.²⁷⁴ However, that account does not help the judge actually decide between justice, identified with the detachment "pole," and mercy, identified with the sympathy "pole."²⁷⁵

Scharffs finds at least a partial resolution in the use of the virtue of humility to adjudicate between the demands of justice and mercy, following Micah's command to "do justly, and to love mercy, and to walk humbly with thy God."²⁷⁶ For Scharffs, perhaps the most important role of the virtue of humility is as a mean between the extremes of pride and a sense of one's own worthlessness.²⁷⁷ Pride, perhaps most tempting for a judge who is constantly treated as someone more important and valuable than others, can result in the abusive exercise of power, silencing and punishing people who challenge the judge's control or his inflated sense of self.²⁷⁸ But being convinced of one's worthlessness could be an equal liability in a judge. Scharffs notes that abus-

270. Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 148 (1998) (noting that "humility may play an important role in synthesizing, or at least mediating, the tension between justice and mercy").

271. *Id.* at 141-42 (referring to ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)).

272. *Id.* at 142.

273. *Id.* at 143 (citing KRONMAN, *supra* note 271, at 72).

274. *Id.* at 143-44.

275. *Id.* at 145-47.

276. *Id.* at 148-57.

277. *Id.* at 161-63.

278. *See id.* at 163, 173-75 (noting that "[p]ride demands the establishment and maintenance of vertical relationships, with oneself or one's group in some way superior to others" and analogizing the prideful judge to a family abuser who abuses and blames the victim).

ers or victims who have a sense of their own worthlessness may act just as unjustly as those who are proud, wielding violence against others as they lash out, or humiliating others to bring them "down" to the inferior plane where the abuser/victim locates himself.²⁷⁹ Certainly, judges are not immune from these temptations.²⁸⁰

Humility in its first aspect is a virtue we recognize as quite appropriate for a judge: if a judge gives up her pride and realizes that she is not God—acknowledging her role in the constitutional scheme and recognizing her limited ability to know and perfectly judge all human behavior—the judge has some chance at crafting a solution that meets the demands of justice and mercy.²⁸¹ In its second, or egalitarian aspect, humility acts as an equalizer, allowing the judge to extend fellow-feeling to the litigants in the room rather than treating them as inferior objects to be manipulated according to the law.²⁸²

As such, humility dovetails with the virtue of compassion toward or suffering with another. Yet compassion is checked from becoming full empathy by the judge's need for objectivity and dispassionate consideration of the case.²⁸³ This allows both sides to have the opportunity to persuade the judge of their cause.²⁸⁴

The ability to recognize one's own limitations and thus to extend a sense of fellow-feeling or equality to litigants makes it possible for the judge to exercise the duties due process requires—listening to voices other than her own in an effort to understand the problem, being willing to consider solutions proposed by others that she might not have considered, and showing respect to the complaints and concerns of others. We might argue that a good judge effaces herself in the process of adjudication—not in the sense that she becomes less than human, but that her sense of self recedes, so that she can be fully attentive to the situations of those before her and fully occupied with the task of crafting a fair solution.

It is difficult, however, to imagine how electoral politics is compatible with a virtuously self-effacing and humble judge. George McGovern, recently interviewed about why he was not on the Democratic Party speaker list at the

279. *Id.* at 175-76. Scharffs notes that abusers can vacillate between feeling prideful and inferior, without being able to find an equilibrium or mean between the two states. *Id.*

280. *Id.* at 192-93, 195-96 (noting judges who are corrupted by deference to them, and act as bullies in wielding their power).

281. *See id.* at 186-87, 190-91 (noting that prideful judges want to be prophets rather than priests, and act as if they are the source of their own authority rather than respecting the sources of authority).

282. *See id.* at 195-96 (noting that humble judges are more likely to be respectful and patient with advocates).

283. *Id.* at 168-70.

284. COMTE-SPONVILLE, *supra* note 172, at 105 (defining compassion as "participation in the suffering of others").

convention, noted, "all of us have an ego. You've got to be an egomaniac even to run for president."²⁸⁵ Electoral politics is a sales job that requires politicians to focus in an almost self-absorbed fashion on who they are and why their ideas are preferable to their opponents'. Good—we might argue virtuous—politicians are required to convince the electorate that they are the charismatic leader with the gifts necessary to respond to the current crises or opportunities of a democratic society. While the very best politicians practice attentiveness to the expressed concerns and needs of others (which is why shaking hands and constituent services will never go out of style), it is highly doubtful whether a politician could succeed in a campaign if he were effective in saying, "don't pay any attention to me at all. Look at the situation of these people and the policies I am proposing to alleviate their concerns." Yet, this is precisely what we are asking a good judge to do. It is difficult to imagine many candidates exercising both the habits of self-promotion and self-confidence necessary to convince others that they are in charge of the future and, at the same time, possessing the habits of self-effacement and humility that good judges need.

C. Honesty as Consistent Rhetoric

As with other public officials who must stand for election, judges walk a complicated tightrope between being candid too frequently and honest not often enough. As I have earlier suggested, some have argued that the willingness to be completely candid has been a key virtue in the American story, from George Washington's ill-fated cherry tree to William Jefferson Clinton's performance in the Paula Jones deposition.²⁸⁶ By contrast, we might note the wide range of what religious and social cultures across the world will tolerate in terms of truth-telling. Many cultures take a practical and situation-dependent approach to this virtue, suggesting that some deception is preferable to full candor and brute honesty, whereas others hold to the truth more absolutely.²⁸⁷

Honesty, and its robust twin candor, are qualities that Americans demand in any public official, whether she occupies judicial, legislative, or ex-

285. Rob Hotakainen, *The Old Guard; Not-for-prime-time Players; The Practice of Keeping the Spotlight Studiously off the Party's Losing Presidential Candidates is Criticized as Disloyal—and Defended as Forward-looking*, STAR TRIB. (Minneapolis-St. Paul), July 27, 2004, at 9A.

286. This point I owe to Robert Cover, who taught my ethics class in fall 1983.

287. See, e.g., MACINTYRE, *supra* note 9, at 192-93 (suggesting that Kant's absolutist view about truth-telling may well stemmed from his Lutheran pietist culture, which brought up its children to believe that they should tell everyone the truth at all times, no matter what the consequences. By contrast, MacIntyre notes that Bantu parents have taught their children not to tell the truth to strangers, because they believed that this would open their family up to harm through witchcraft.).

ecutive office.²⁸⁸ But the specific "flavor" of the virtue of honesty that Americans have come to expect from their leaders varies from post to post. On rare occasion, the concern is with too much candor. Judges, for example, are often expected to withhold views about controversial matters that may concern them as citizens but not as judges, as Judge Wilkerson found out when he opined that "God in Heaven" was not pleased with California's extension of benefits to same-sex couples.²⁸⁹

But the more critical question for purposes of election campaigns is whether judges can be good campaigners and still be honest enough to serve in their public role as judges and community leaders. In the election of legislators, for example, voters have come to expect a certain amount of exaggeration and dissembling, both about the candidates' own qualifications and records and about their opponents'.²⁹⁰ Indeed, they have come to expect these things when an official is elected, so long as the nature of the exaggeration does not pass into outright falsehood. Those politicians who have survived on the virtue of uncompromising honesty are thought unusual, and are given names such as "the conscience of the Senate."²⁹¹ Moreover, voters expect that a politician who is trying to reflect the wishes of many constituencies, please voters, and gain their trust will consider the audience he is speaking to and frame his "pitch" accordingly, even promising inconsistent things to different groups of voters. Indeed, because they have a keen and ironic sense both for the myth of honesty and the reality of political success, a great sport of the press is trying to expose politicians who engage in the rhetorical massaging of their campaign messages by comparing their campaign speeches to uncover inconsistencies.

By contrast, even if we would not accept the view that judges must be held to a higher standard than other politicians,²⁹² judges who try to, in those cynical words, "talk out of both sides of their mouths" are not likely to be

288. See *supra* notes 141-42 and accompanying text.

289. See Miss. Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006, 1015 (Miss. 2004) (holding that the state had no compelling state interest that was furthered by suppressing the judge's views on matters of politics or the public interest). But see Scott v. Flowers, 910 F.2d 201, 203 (5th Cir. 1990) (judge could not be sanctioned for speaking out on problems regarding the administration of justice in his state).

290. See Robert C. Berness, Note, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 RUTGERS L. REV. 1027, 1028 (2001).

291. See Joseph Farah, *The Conscience of the Senate?*, WORLDNET DAILY NEWS, Nov. 12, 2002, available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=29626 (describing the term to mean a person who will not compromise his principles, and referencing Sen. Paul Wellstone).

292. But see ACLU v. Fla. Bar, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) (noting that states may hold judges to higher standard of conduct than other officials in view of the professional standing of lawyers).

successful judges, much less respected ones. A judge who tries to appease both litigants in a trial by saying one thing to one litigant and another to his opponent is bound to add to the confusion, anger, and anxiety that comes with interpersonal conflict instead of alleviating or ending it. A judge who is seen as exaggerating the facts so that she can reach a particular conclusion is not only called names—most often, “result-oriented”²⁹³—but is rarely considered virtuous. Indeed, so has the scientific view of judging affected the judicial profession that the entire language of acceptable judging is permeated with science’s commitment to brutally honest observation of the material world. Good judges, at least in the common wisdom, “find” the facts of a case, as if they were discoverable like minerals in nature rather than through an intuitive process of guessing which witness’s story is more likely to be correct than any other. They “interpret” (read: translate from one existing reality into another) or “apply” (take an existing tool and use it) the law, rather than “make” it.

To elect to judicial office those who are successful politicians and thus operate with a somewhat differently understood virtue of honesty is to give up the cherished illusion that judges will be brutally and thoroughly honest in confronting the facts “as they are” and the law “as written” in deciding cases. It is to give up the illusion that when one asks a judge to participate in, say, a charitable organization or community meeting, one is asking perhaps the “most honest” man or woman in town to deliver credible assessments of the work of that organization or community.

The decision to “fudge” on the judicial honesty factor by encouraging good politicians to run for judge is also to give up on our vision of judges as those who serve as the “conscience of the community.” It is to give up on the hope that in the toughest cases, such as when a brutal murder is committed and passions for revenge run high, the judge will be the one who holds up the values of the community to it, Atticus Finch-like, and demand that the community live up to those values by delivering the judgment that she believes the community would have made if it were responding out of its “better self.” It is to give up the possibility that judges can hold litigants as well as themselves to the highest standards of self-criticism, that they will have the character that is worthy of demanding that an abusive husband, a common thief, or a corporation acknowledge their own wrongdoing and make recompense with their victims. It is to give up the hope that judges themselves, when in their finest introspective moments in deciding cases, will turn the skill of brutal honesty upon themselves, questioning whether they are taking the easiest or most popular route in deciding a case, or punishing a litigant because he has not lived up to their personal values and expectations rather than the law’s demands.

293. See, e.g., Robert G. Miller, *Machiavellian Justice*, 65 TEX. B.J. 916, 916 (2002) (describing a Texas Supreme Court judge as the definition of a “result-oriented” judge for “picking a result while disdaining precedent”).

As Comte-Sponville suggests, this ability to do justice through honesty also implicates the quality of mercy.²⁹⁴ Comte-Sponville rejects what he understands to be a Christian reading of the quality of mercy—i.e., the choice to un-remember an evil done against one and refuse to return evil with evil.²⁹⁵ Rather, he argues that the virtue of mercy or forgiveness means to hold a wrongdoer accountable without hating him.²⁹⁶ In this account, for example, a good judge works to transform a community desire for vengeance in the case of a brutal slaying into an equally passionate but less destructive instinct toward asking the offender to restore the imbalance he has created with his crime by paying for it. At the same time, the quality of mercy refuses to return evil to this offender equal to the evil he has done, and offers him the possibility of restoration into the community once he has paid the price.

Politicians also practice mercy, but because their vision is primarily prospective as compared to the retrospective eye of the judge, politicians have the luxury of practicing mercy understood in the larger sense that Comte-Sponville rejects. That is, they can “let bygones be bygones” and focus their attention on how to reform a system or identify those persons who will run it properly for the future. Thus, political commissions rarely focus on holding evil or incompetent officials accountable, in the sense of seeking an appropriate punishment, whether they are Abu Ghraib torturers or people who have failed in major national security responsibilities.²⁹⁷ Rather, they leave that to judges, and turn their energies toward the problem of changing “the system” so that these acts cannot be repeated. Even those judicial campaigns that beat an incessant drum about the incumbent’s failures are primarily focused not on holding an incumbent responsible for his failures, but on getting rid of him so the next person can do a better job.

As such, the nuanced and difficult position of a judge who must temper justice with mercy may well be lost on the virtuous politician who is simply focused on making things better for the future. In the simplicity and practicality of his search for practical solutions to community problems—solutions that tend to involve structures, rules, and job descriptions—he may not be good at discerning the complex way in which accountability demands both a consideration of a litigant’s evil and of his circumstances.

In summary, then, while judges like politicians may be called upon to practice the virtues of fidelity, humility, and honesty, the shape of those virtues required in judging is quite different than the way in which those virtues are defined for political campaigners. If we accept that human beings have a

294. See COMTE-SPONVILLE, *supra* note 172, at 84-85.

295. *Id.* at 118-19.

296. *Id.*

297. See, e.g., Editorial, *Holding the Pentagon Accountable: For Abu Ghraib*, N.Y. TIMES, Aug. 26, 2004, available at <http://www.nytimes.com/2004/08/26/opinion/26thurs1.html> (noting failure of Iraq commission to hold higher officials accountable even while identifying their failures).

limited store of virtues, we need to ask whether we want to identify those with judicial virtues and forego the political virtues that make them electable, or whether we want to accept those with the political "versions" of these virtues along with the changes in judicial practice that they portend.

CONCLUSION: SEARCHING FOR ALTERNATIVES

If, then, politicians have different virtues (and vices) than judges, which makes direct popular election a poor vehicle to elect virtuous judges, we might want to ask how a judicial selection procedure might be devised that takes account both of the practical wisdom that common people have to offer, and the expertise that lawyers and judges themselves can offer.

The ABA's recent report suggests a number of changes to both judicial appointment and judicial election systems. For example, the report suggests that all judges should be subject to evaluation by a nonpartisan, neutral, qualified selection board, whether they are elected or appointed.²⁹⁸ Moreover, the report suggests that every state incorporate some form of judicial evaluation program, along with funding for organizations like NSCS and the State Justice Institute that collect information about judicial "best practices."²⁹⁹ In addition, the ABA report suggests that there be a comprehensive review of judicial ethics codes and more aggressive enforcement against violators.³⁰⁰ In addition to changing judicial selection procedures, the ABA also suggests more attention to voter education, as well as voluntary agreements among candidates on financing and election activities and public financing of judicial elections.³⁰¹

However, some of these proposals merely tinker with existing systems instead of offering new solutions to address the problem created especially by judicial election processes. Just to give some examples of how states might "think outside the box," I will offer only a few brief solutions, without trying to make a substantial case for any of them. These suggestions serve as examples of the ways in which political accountability can be married with the independence and expertise of independent bodies. Some of these suggestions mimic others that have been discussed in some way.

Merit selection is touted as the great alternative to judicial elections or pure appointment systems. However, in most states, merit selection, even when it is regulated by state statute, remains vulnerable to the elitist charges originally made in the move to elections in the 1800s.³⁰² Radicals who fa-

298. See JUSTICE IN JEOPARDY, *supra* note 8, at 68-69 (following 2000 Report of Commission on State Judicial Selection Standards); Daugherty, *supra* note 22, at 319.

299. See JUSTICE IN JEOPARDY, *supra* note 8, at 71-72.

300. See *id.* at 75-76.

301. *Id.* at 78-81.

302. See Dimino, *supra* note 22, at 312 (describing Nelsons' view that the conflict over elections was between elites and populists); Maute, *supra* note 14, at 1209. Jus-

vored direct elections did so in order to supplant conservative judges of opposing parties with their own judges—that is, they saw elections as a chance to substitute one party's views for another's on the bench.³⁰³ Moderates were more concerned that judicial candidates would be sycophantic to appointing entities, both before and after elections, thus destroying the possibility of judicial independence.³⁰⁴

Modern merit commissions fall prey to both of these concerns. First, although many state statutes require that merit commissions be geographically and professionally diverse, including non-lawyers as well as lawyers,³⁰⁵ there is no guarantee that appointed merit selection commissions are going to obviate the problems of partisanship or elitism. Gubernatorial commissions are likely to reflect either the political or the community connections of the governor and his staff.³⁰⁶ As such, in the worst cases, such commissions may be highly politicized and select judicial appointees who have been active in the party, raised funds for candidates, or otherwise reflect party values.³⁰⁷ At best, they will reflect the limits of the governor's acquaintances, who are likely to be a small circle of state power-brokers. The likelihood that a governor will appoint "common people" whose experiences more mimic those of the litigants who will come before a judge is thus small. Legislatively appointed commissions, while perhaps more reflective of diverse interests, may

tice O'Connor noted in *White* that the first 29 states adopted non-elective methods for selecting judges, but that beginning with Georgia in 1812, and especially between the 1830s and 1850s, more election systems were used, so that by the Civil War, twenty-two out of thirty-four states elected judges. *Republican Party of Minn. v. White*, 536 U.S. 765, 790-91 (2002) (O'Connor, J., concurring).

303. See Dimino, *supra* note 22, at 311.

304. *Id.* at 311-12.

305. See, e.g., MINN. STAT. 480B.01(2) (2004) (describing composition of Minnesota's merit commission); Daugherty, *supra* note 22, at 329 (noting that the original Missouri plan called for three lay people, three lawyers, and the chief judge of the Supreme Court); Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 66-69 (1994) (describing national trends to increase racial and ethnic, as well as geographical and experiential diversity of merit commissions); Maute, *supra* note 14, at 1208-09 (noting requirement of lawyer/lay and political party diversity in many statutes).

306. See JUSTICE IN JEOPARDY, *supra* note 8, at 69 (noting that concern has been expressed that the appointing authority or "politics in general" too often influences merit selection boards). Daugherty, *supra* note 22, at 329 (noting attempts to lessen the power of the Missouri governor to appoint members of the merit commission due to charges of cronyism).

307. See Cheek & Champagne, *supra* note 25, at 1361 (noting campaigns over appointing merit commissions); Maute, *supra* note 14, at 1235 (also noting three types of schemes for selecting candidates supporting gubernatorial political preferences); Daugherty, *supra* note 22, at 328 (noting the uproar in Missouri when political favoritism resulted in a governor's staff member who had never been a judge being appointed to (and retained on) the Missouri Supreme Court in 1986).

similarly reflect legislative circles of friends and influence.³⁰⁸ And, there is no guarantee that minority groups will be represented in judicial selection processes, whether judges are appointed or elected, a concern that has led to a number of Voting Rights Act suits against judicial selection schemes.³⁰⁹

One alternative to direct elections of judges would be to borrow from the representative system we use to make other important democratic decisions to elect our judicial merit commissions. Commissioners could be elected in districts as well as some proportion of at-large seats, reflecting both local and statewide concerns about the administration of justice. The merits of such a plan would be the same merits as any form of representative government: commissioners themselves could be good politicians who could employ staff to counterbalance their virtues toward the wise selection of judges. Although they would be beholden to the electorate for the body of work they would perform, they could politically afford to take some risks on appointing a particular candidate who might not be well-connected or even popular with the electorate, so long as electors deemed their decisions sound on the whole.

A second direction for alternatives grows out of efforts to increase public awareness of judicial qualifications through evaluation systems. Many states already employ voluntary "judicial watch" or judicial evaluation programs, either through the bar or citizen groups, who make endorsements or provide evaluations of judicial candidates based on significant information about the candidates.³¹⁰ However, these programs depend upon continued public interest in evaluating judges, which is likely to wax and wane based on the local judicial climate. By contrast, a public body like a statutory merit selection commission not only has the advantage of guaranteed continuity, but also an imprimatur of authority that voluntary bodies may lack, as well as the economic wherewithal to actually get its message out. In fact, six states have even set up official judicial evaluation programs that rate judges based on such matters as integrity, judicial temperament, communication and administrative skills, preparation and attention to cases, and fairness.³¹¹ These evaluations are shared with the public.³¹²

One possible variation on this theme of informing voters without taking away their choices is to follow the ABA's call for a Judicial Eligibility Commission that would make their evaluations of applicants for judicial positions

308. See Driggers, Jr., *supra* note 6, at 1226-28, 1231-32 (noting that South Carolina's old legislative appointment system resulted in the appointment of legislators to the bench, and that its new legislatively appointed judicial merit commission gives significant power to the three legislators who appoint the commission).

309. See, e.g., Daugherty, *supra* note 22, at 331-38, 340-41 (noting problem with official appointments to the commission, in which "white male[s]" select others to serve on these commissions).

310. See, e.g., JUSTICE IN JEOPARDY, *supra* note 8, at 72-74 (noting that most other states rely on bar association evaluations).

311. *Id.* at 72-73.

312. *Id.*

public, even in states with contested elections.³¹³ Merit commissions might screen candidates into a finalist pool, as they do now. However, instead of turning their list of finalists over to the governor or legislature for appointment, the list of finalists could be voted on by the public, either with or without the imprimatur of an endorsing authority.³¹⁴ Since a major drawback to the current judicial elections system is that voters do not have the interest or time to do a thorough background check on possible judges, this system borrows the strengths of the merit selection process. By conducting inquiries of supporting and opposing lawyers, judges who have heard candidates' cases, and others who have seen their work in depth and have a professional evaluation of their competence and integrity, merit commissions could serve as a voters' screening mechanism.

If a particular state polity was concerned that such a system would continue to produce partisan and elite candidates, they could expand this electoral process to permit non-screened or non-final candidates to run for election alongside those candidates "vetted" for election by the merit system. However, for those voters who want the experienced evaluation of elites, or do not wish to wade through the qualification materials produced by the merit commissions, the endorsement of the merit commission alone could inform their selection. This system would be preferable to the existing one, which at best lets voters choose based on party endorsement. And candidates deemed the best by their peers and other professionals would have a "leg up" on the opposition in a campaign by having the endorsement of a respected body.

In those states where such endorsement would still be considered elitist, merit commissions could serve as investigators of all candidates. Applicants for judicial seats could be required to turn over their portfolios, resumes, and references to the merit selection commission. The commission would undertake an objective analysis of the candidates' credentials, summarize for voters what kind of experience the candidates bring to the position, and educate voters about the skills, gifts, experience, and virtues that they should look for in a judge. Essentially, all of this work is already being done by merit com-

313. *Id.* at 52; ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, COMM'N ON STATE JUDICIAL SELECTION STANDARDS, STANDARDS ON STATE JUDICIAL SELECTION 9 (July 2002), available at <http://www.abanet.org/judind/downloads/reformat.pdf> [hereinafter JUDICIAL SELECTION STANDARDS] (recommending that states that do not currently have Missouri-plan nominating commissions create a commission which must screen all candidates to determine whether they are qualified to stand for election or appointment). This commission would be independent from any appointing authority, whether it be gubernatorial, legislative or judicial, or any electoral system. *Id.* at 10.

314. The ABA report on judicial selection contemplates that endorsing authorities such as parties and bar associations will utilize Eligibility Commission findings in their endorsement programs, as well as any additional criteria such as party loyalty. JUDICIAL SELECTION STANDARDS, *supra* note 313, at 17-18, 21-22.

missions;³¹⁵ the only difference is that the public, and not the commission or the governor, would be making the final vote on who should be selected.

Finally, the ABA report has suggested that judges be given lengthy terms of around fifteen years to ensure their judicial independence after appointment and not be subject to reappointment to ensure judicial independence.³¹⁶ For those jurisdictions that want to retain a re-selection process, the report recommends merit committee re-selection; and for those jurisdictions that want to retain elections, it recommends that such elections be permitted only when a judge initially takes the bench, to ensure that judges will not be swayed in later rulings by the necessity of re-election.³¹⁷ The ABA plan seeks to ensure judicial independence by avoiding the most problematic threats to judicial independence—when sitting judges are attacked in single-issue campaigns.³¹⁸ However, the ABA's plan would be an improvement on the Missouri plan, which does not currently offer voters the opportunity to object to a poor selection from the outset, possibly "sticking" a community with a bad judge for a year or more until he can be voted out of office.

If the purpose of the judicial selection process is to identify a judge based on competence rather than his political leanings on a given issue, another option would be to retain the appointment of judges by the governor or legislature upon recommendation of a merit commission but subject the judge to an immediate process of voter approval or disapproval before the judge took office. Unlike the Missouri plan, which sets up retention elections at the same time as other elections, this process would entail significant administrative burdens, as election machinery would have to be geared up at irregular times. It might also be criticized by those who fear that off-time elections fail to draw sufficient voters.³¹⁹ On the other hand, such a system would also tend to highlight judicial races as important moments of voter participation, rather than burying them on a long ballot with legislative offices that may take voters' attention away from judicial races.

This immediate appointment/election system is most likely to require voters to judge a candidate on his qualifications rather than on some unpopular decision that might unseat him later in his career, since most candidates who are subject to appointment will not have a judicial record vulnerable to single-issue attack. Moreover, this system could provide some democratic credibility to a judge at the outset, since she will have been "elected" (albeit without opposition). Yet, she will not be required to engage in the traditional politicking necessary to woo voters from her opponent's side to her own. It solves, to some extent, the complaint that incumbents get an unfair advantage

315. See Goldschmidt, *supra* note 305, at 31-33.

316. See JUSTICE IN JEOPARDY, *supra* note 8, at 93-95.

317. *Id.* at 74-75.

318. *Id.* at 72.

319. See Maute, *supra* note 14, at 1206 (noting lower turnouts and voter rolloff at non-partisan elections).

from their incumbency when they are up for re-election.³²⁰ At the same time, this process will discourage unscrupulous rivals from trying to “pick off” a competent candidate by sparring about particular issues or engaging in dishonest conduct, since rivals would first have to win the battle to have voters disapprove an appointed candidate and then be selected as the follow-up candidate.

There are, of course, at least two major possible drawbacks to the immediate appointment/retention option. First, the judicial post might be subject to an endless number of elections if the merit commission were required to offer one candidate after another to be approved or rejected by the electorate. However, statutory provision could be made for some limit to the number of times merit-selected candidates could be defeated before the seat became vacant. Second, if the merit commission has made a good, but not the best, judgment, a single-candidate “up or down” approval vote might yield a judge that the voters could live with, but no opportunity for them to vote for the best candidate, as a three-candidate runoff or open election at least theoretically provides.

These three proposals—election of merit commissions, prior official endorsement of candidates standing for election by merit commissions, or immediate election after appointment selection—may be no wiser solutions than those currently available. However, if judicial selection reformers move from focusing on the larger conflict about the values of independence and accountability and begin to focus on why good judges do not often make good candidates, they may be able to come up with solutions that balance important political values and still permit good judicial candidates to live out their virtues both before and after they assume the bench.

To be sure, there will be no perfect solution for the problem of selecting judges, and every system that is devised will contain ways in which ambitious and unscrupulous candidates will evade it. And every system will be prey to those whose actual pursuit of office is either too much an end, or simply a means to quite another end. Greg Wersal, whose original quest for judicial office was focused on his concerns about judicial activism and abortion, continued his litigation unabated. In addition to his lawsuit challenging the political party restrictions of the Minnesota canons, he also embarked on an unsuccessful quest to unseat a former Democratic legislator appointed to the Minnesota Court of Appeals, and to put Wersal’s brother on the ballot instead.³²¹

320. See, e.g., Cheek & Champagne, *supra* note 25, at 1366 (noting that incumbent judges have an advantage over non-incumbents); Nelson, *supra* note 11, at 1640-41 (arguing that incumbency labels are less satisfactory than party labels).

321. See Patrick Sweeney, *Lawsuit: Judge Is Out of Bounds*, ST. PAUL PIONEER PRESS, July 22, 2004, available at <http://www.twincities.com/mld/twincities/news/local/9210502.htm?1c>. Wersal argued that redistricting made the appellate judge ineligible for the seat since he lived outside the district after his appointment was announced and redistricting occurred. *Id.* The Minnesota Supreme Court rejected Wersal’s argument in *Clayton v. Kiffmeyer*, 688 N.W.2d 117 (2004).